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*Testimony of Ted Curry*

VOL. II.

746

**DEPOSITION OF TED CURRY.**

\* \* \* \* \*

748

**TED CURRY,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Would you state your name, please, sir?

"A. Ted Curry.

"Q. And your home address?

"A. 502 Tresid, Apartment 1, Akron 13, Ohio.

"Q. By whom are you employed, sir?

"A. B. F. Goodrich Company.

"Q. For how long have you been employed by that company?

"A. In excess of 20 years.

"Q. What is your present title or position?

"A. Controller of Retail Stores.

"Q. And what is your office address?

"A. 500 South Main.

"Q. In what city, sir?

"A. Akron, Ohio.

"Q. Is that the home office of your employer company?

"A. It is.

749 "Q. Now, then, Mr. Curry, would you outline, please, sir, what positions you have held and what generally the duties and responsibilities of each position are in your course of about 20 years' employment by B. F. Goodrich Company?

*Testimony of Ted Curry*

"A. The first position held was that of budget man. In that capacity, I did sales work, collection work, and some accounting.

"Q. And where were you working at that time?

"A. That was in San Antonio, Texas.

"Q. For about how long did you hold that position?

"A. In excess of a year.

"Q. And from there where did you move?

"A. The next assignment was in Harlington, Texas, as a credit and operating manager. The credit and operating job was largely accounting and collections, credit work, some sales work.

"Q. Were both of these first two positions in connection with a retail store operation?

"A. Yes, both retail stores.

"Q. Of the B. F. Goodrich Company?

"A. Yes, the first store was located in San Antonio 750 at Lexington and Euclid Avenue. It does not exist in that location any more.

The second store was on Jackson Street and Harlington.

"Q. And what was your third position with the company?

"A. I was service manager in our Corpus Christi, Texas, store. In that particular assignment, I had charge of the services that were rendered in the store which included the installation of our products to the customers' cars, primarily.

"Q. For about how long did you hold that position?

"A. That was about six months, as I recall it.

"Q. And do you recall what your next position was?

"A. Yes, I was store manager at Port Arthur, Texas. As store manager, I had charge under the supervision of our district personnel of all of the functions of that store, which included its sales activities, its accounting activities, credit activities, and service activities.

*Testimony of Ted Curry*

"Q. And after that, where did you move?

"A. I was then assigned to the Beaumont, Texas, store as store manager with like duties.

"Q. For how long did you continue in the role of store manager at one or another of the stores?

751 "A. In the Port Arthur store as I recall now, it was about a year.

In the Beaumont store, about 15 or 16 months. I don't recall exactly.

"Q. And what was your next position?

"A. I was store manager at our Austin, Texas, store, like duties.

"Q. How long were you there, please?

"A. Four years.

"Q. Thereafter, what was your position?

"A. I was store supervisor in our Houston, Texas, District which included stores along the Gulf Coast area, stretching from Lufkin, Texas, to Brownsville, Texas, at a point about a third in from the state. It covered variously from six to eleven stores.

"Q. And was this your first advancement to a district level with your company?

"A. Yes.

"Q. And I take it from the job title that you had to do with the merchandising in the stores that you managed?

"A. That is right.

"Q. Thereafter what position did you hold?

752 "A. I became manager of retail operations for one-half of the Southwestern Zone, headquartering in Kansas City, and having the stores in the—what was then known as St. Louis, Kansas City, and Omaha Districts. That job was later expanded, some two years later, to cover the Western Region as it became designated then, covering about a fifth of the country.



*Testimony of Ted Curry*

“Q. For how long did you hold that position, sir?

“A. The total of the two tenures as manager of retail operations was six and a half years.

“Q. And thereafter, what position did you hold?

“A. I came to Akron to become controller of retail stores.

“Q. Will you give us the approximate date of that?

“A. I came here on August 7.

“Q. What year?

“A. Of this year.

“Q. So that during the course of more than 20 years' employment by B. F. Goodrich and Company, you have been directly—your positions have all been directly related to the managerial or accounting end of the retail store operations of your employer?

753 “A. That is correct.

“Q. And over the course of time, you have advanced from one position to another, and ever since you came to the district level you have been responsible for an increasingly large area?

“A. That is correct.

“Q. And I take it since your advancement to the home office and your present title, you are concerned actually with all stores in the United States?

“A. That is correct.

“Q. Operated by the B. F. Goodrich Company?

“A. Correct.

“Q. Now, Mr. Curry, the lawsuit in which your deposition is being taken concerns a store which is in the tire business as a retail store, located in Memphis, Tennessee, and makes sales to customers in that community. I realize that in connection with the tire manufacturing, your employer, B. F. Goodrich and Company, you might also have some information or knowledge about sales in the international market of tires, or sales to manu-

*Testimony of Ted Curry*

754     facturers of automobiles, and I want you to understand that my questions and the frame of reference of my questions today will be excluding such foreign sales or sales to manufacturers and will pertain to sales by a store that sells to customers in its community.

With that background, would you please state, sir, what is the classification of sales by such a store to customers in its community of tires, tubes, and other rubber products—how are such sales categorized or classified?

“A. There are two classifications. Tires that are sold for resale are called dealer or wholesale sales. Tires that are sold to be used by the purchaser are retail.

“Q. And am I correct in thinking that some organizations attach the term consumer sales to these tires that are sold to be used that are purchased?

“A. Right.

“Q. Are there several different categories or types of sales that are included within the consumer or retail sale classification?

“A. Yes, there are two. The retail sale of the one customer who comes into your place and purchases and such sales that we know as commercial sales which are a  
755     subheading or a part of retail sales. Those are the accounts that have multiple vehicles and who justify or warrant regular solicitation and regular calls.

“Q. In determining whether a sale shall be classified as a retail or consumer sale, or whether it should be classified as a sale for resale, does the use to which the product is to be put enter into it, or does the quantity to be purchased enter into it, or does the frequency of the sale by a given purchaser enter into it, or does the character of business that the purchaser may be engaged in enter into it?

“A. Will you restate your question?

*Testimony of Ted Curry*

“Q. Yes. In classifying sales by a retail store or a tire store that sells to purchasers in its community, is there a differentiation—correction, strike that.

Would a sale be classified as a retail or consumer sale regardless of the character of the purchaser, or the frequency of the purchase by that purchaser, or the quantity of tires purchased by that purchaser so long as the purchaser is the consumer of the product?

“A. It would.

756 “Q. And would that in any of those events be classified as a retail or consumer sale?

I can see by the puzzled look on your face I have not clearly stated it.

“A. Please restate it.

“Q. I am trying to determine, Mr. Curry, if there are two types of sales as you may have said, and that one of them are sales for resale and all others are sales to the consumer and are classified as retail sales?

“A. That is right.

“Q. Is this definition and classification which you have given us based upon your experience over a period of many years with the employer B. F. Goodrich Company in the several positions that you have held?

“A. Yes.

“Q. From your activities in those positions, can you state whether or not that same basic definition or classification of sales is observed by other components of the tire industry?

“A. You are referring now to competitors?

“Q. Yes.

“A. It would be hearsay, but to my knowledge, yes.

757 “Q. Do the records and accounting procedures and what-not of your company reflect this same basic two-part classification of sales that you have just outlined?

“A. Yes, sir.

*Testimony of Ted Curry*

“Q. At my request, have you brought some of those records in with you today?

“A. Yes, sir, I have.

(The said document was marked as Deposition Exhibit No. 1, Witness Curry, by the Notary.)

By Mr. Mitchell:

“Q. Mr. Curry, I have asked the reporter to mark as an exhibit which has ‘Bi-Daily Sales Analysis and Costing Summary’ and which has other information printed on it. It appears to be a B. F. Goodrich store form. Would you tell us briefly and generally what use is made of this particular accounting sheet and how information is entered on it?

“A. Yes, sir. This is commonly known as a spread sheet where we break out the sales by classification, departments, and by channel of trade.

In our stores, each sale is covered with a sales ticket and that sales ticket is then broken out into this sheet. If

you will notice at the extreme left hand corner,

758 as an example, passenger tires. Passenger tire

would be classified, if it was retail, under the retail column, with the extreme left hand column being sales and the column next to it as the cost of that sale. That has reference with the cost of the merchandise.

If it is a commercial sale which is the next classification down which is a part of retail, we know or recognize the commercial account as one who has a fleet of trucks. We would recognize him by his name and by our listing and enter it to that particular section of the report.

If it is a dealer, someone who is engaged in the business of buying tires for resale, we would enter that sale into the bottom column and so account for it.

“Q. Now, then, you have indicated that on this sheet, the lower third area of it is devoted to that which is titled commercial, and you have indicated that that is a

*Testimony of Ted Curry*

subdivision of your retail or consumer sale category. Would you explain, sir, what the purpose of segregating that part of the retail sales may have been from your company's viewpoint?

759 "A. Yes, sir. There are two reasons. We wanted to know, first, what portion of our business was the people who come in casually to buy from us, and what portion or what percentage was representing in the trucking accounts in the area to whom we have regular solicitation.

"Q. Now, then, at what point or at what location is the information spread on this spread sheet made Exhibit 1 to your deposition?

"A. Repeat?

"Q. Yes, sir. At what point in the merchandising channel, that is, at the retail store itself or some district—

"A. This is performed at the retail store.

"Q. At the retail store?

"A. Yes.

"Q. And are there instructions that go out to bookkeepers or clerks or others who perform this function?

"A. Yes.

"Q. In the retail stores?

"A. Yes, sir, there are instructions.

"Q. And do those instructions coincide with this classification of sales?

"A. Yes.

760 "Q. Into two broad categories?

"A. Yes, sir, they do.

"Q. Of which you have already testified?

"A. Yes.

"Q. I take it pursuant to those instructions a bookkeeper or clerk fills out the spread sheet which you have made Exhibit 1?

*Testimony of Ted Curry*

"A. That is right.

"Q. Now, sir, also at my request you have brought in another type of accounting record which I will ask the Court Reporter to mark Exhibit 2 for the deposition.

(The said document was marked as Deposition Exhibit No. 2, Witness Curry, by the Notary.)

By Mr. Mitchell:

"Q. Now, please, Mr. Curry, would you tell us generally what the purpose and function of this Exhibit 2 may be, sir?

"A. Yes, sir. This is a recap sheet from which we take the information that is developed in the first form and transfer into a consolidated form here. It also has place or room for a cash recap, if you will notice in the middle of the sheet, and to the right hand of the sheet is certain data that we need or use at the end of the month relating to units.

761 This sheet is then mailed to our home office every other day, is prepared every other day and mailed into our home office, and from this sheet an operating statement is developed for that particular store.

"Q. And at what point is this Exhibit No. 2 prepared?

"A. This is prepared in the field, at the store, the same place this is prepared.

"Q. And, of course, when you indicate 'this' you are referring to Exhibit 1?

"A. Right.

"Q. Does this Exhibit 2 carry out the same basic allocation or classification of sales in accordance with the definition you have stated?

"A. Yes, sir.

"Q. Also at my request you have brought in another set of accounting records which I will ask the reporter to mark as Exhibit 3.

(The said document was marked as Deposition Exhibit No. 3, Witness Curry, by the Notary.)

*Testimony of Ted Curry*

By Mr. Mitchell:

“Q. I will ask you, Mr. Curry, what this accounting sheet now marked Exhibit 3 to your deposition may be, and how it is used?

“A. This is a retail store operating statement. The information that is developed from Form 1, consolidated on Form 2, is then transposed to this sheet in our Akron offices. Together with that information, certain other information which comes to us by different routes such as our expense spread is entered to this sheet.

“Q. And where is the information compiled and entered on your Exhibit 3?

“A. In Akron.

“Q. And it is a compilation or an accumulation, as I take it from your testimony, of information that had appeared on Exhibit 2 and likewise—

“A. That is correct.

“Q. —originally on Exhibit 1?

“A. That is correct.

“Q. Now, then, it is obvious by inspection, but does this same classification of sales into the two basic categories that you have described, is that followed through on your Exhibit 3?

“A. Yes, it is.

“Q. I notice that here on your Exhibit 3 there is in the upper part of it a further classification ‘DFB’, and I would like for you to explain, if you would, please, sir, what those initials refer to?

“A. That is direct factory billing, sometimes known as fleet national accounts. Those are accounts that are negotiated and sold by a home office staff. The merchandise and service is delivered at a store, but the actual billing is rendered by the home office group.

There is no billing prepared in the store other than a transfer. The actual billing to the customer occurs at the home office.

*Testimony of Ted Curry*

"Q. And these national accounts who are entitled and who arrange or contract with your home office personnel to purchase under a plan of this sort, are they listed by your company and recognized by all of the dealers or stores that you may have throughout the United States?

"A. Yes, sir, they are listed in bulletin form and known to stores and dealers.

"Q. And you have indicated that the sales agreement, the solicitation, the offering, and the consummation of an agreement is conducted between the home office of  
764 your employer and the appropriate representative of these national accounts. What is the function, then, of the local retailer or local store in connection with this kind of business?

"A. The local store is a delivering and servicing agent.

"Q. And is it compensated for that service?

"A. Yes, it is. That store is compensated on a percentage basis for the service rendered.

"Q. From your company's viewpoint, is this DFB transaction considered a sale at the local retail store level?

"A. No, sir, it is not.

"Q. In the course of accounting and of keeping the records with regard to the retail store or dealers of Goodrich products, are these DFB transactions pulled out when quantity discounts or certain other functions, certain other computations are made?

"A. Would you restate your question?

"Q. Yes, sir. You have indicated that the DFB transactions are not considered as sales made by the local retailer or store, and I see here that they are included in a store operating statement which, if I understand your  
Exhibit 3 corresponds roughly to what may be  
765 known as a profit and loss statement. My question is: If in computing the amount of sales by a



*Testimony of Ted Curry*

retail store or dealer or computing any quantity discount that that store or dealer may be entitled to or in any other connection, are these DFB transactions adjusted as excluded?

“A. They are excluded for that purpose, yes, sir.

“Q. And that exclusion from the sales total is consistent with what you have just said about not considering them sales made by the stores?

“A. That is right.

“Q. But merely a delivery function?

“A. That is right.

“Q. Now, then, Mr. Curry, do the Exhibits 1, 2, and 3 to your deposition reflect the whole process of accounting for sales by a dealer or at a retail store of the Goodrich Company up to the point where information from your Exhibit 3 would be accumulated with information from many similar accounting statements for presentation on the composite P and L statement of your employer?

“A. Yes.

“Q. And throughout it is apparent, but for the record, your company's records do maintain this consistent  
766 classification system as regards sales?

“A. Yes, sir.

“Q. Now, then, at my request, have you brought in also instructions that go out to store managers or appropriate officials in store operation by your employer concerning lease terms or lease agreements which will be made for space occupied and used by your stores?

“A. Yes, sir.

“Q. From your experience and participation at several levels up through the management of stores for your employer, are you generally familiar with the fact that when the space is leased, the rent to be paid by your company for the space in some instances is related to the gross sales or some aspect of sales made through the location?

*Testimony of Ted Curry*

"A. Yes, sir.

"Q. And have you brought in what appears to be instructions concerning how the terms and provisions of such leases will be drawn?

"A. Yes, sir, I have.

Mr. Mitchell: I ask that they be made Exhibit 4 to your deposition.

(The said document was marked as Deposition Exhibit No. 4, Witness Curry, by the Notary.)

767 By Mr. Mitchell:

"Q. Now, then, if you would, please, Mr. Curry, turn to the appropriate place in your Exhibit 4 at which such terms as 'retail sales' or 'net retail sales' are defined and mark in the margin where those definitions or provisions occur in this Exhibit 4?

"A. It occurs at the fourth and fifth paragraphs beginning on Page 2 and ending on Page 3.

"Q. And do I interpret this correctly, that is your Exhibit 4, to be instructions that go out from the home office of the B. F. Goodrich Company to a store manager or someone else who is authorized to enter into a lease agreement and to contain your employer's choice of provisions that will be included in leases for store space?

"A. Yes, sir, that is correct.

"Q. And the parts that you have marked are the provisions that your employer, as one party to such lease agreements, seeks to insist to have in these lease agreements?

"A. That is correct.

"Q. It is obvious on inspection, but for the record, Mr. Curry, will you state—after whatever rereading of these provisions you may wish—do they coincide  
768 with and do they consistently present this same basic classification and definition with regard to sales by stores or dealers that you have already testified to?

*Testimony of Ted Curry*

“A. Yes, sir, they do.

“Q. One further document, Mr. Curry. I hand you a bound pamphlet which appears to be copies of documents and records taken from your employer's files or such records headed on its cover sheet ‘B. F. Goodrich Exhibits and Related Notes in re Memorandum on What “Is Recognized as Retail Sales” in the Tire Industry’ and the date of which is July, 1954, appearing on the cover sheet.

I ask you if you can identify that, sir, as having come from your company's records and consisting of accounting data, directions to store personnel, or other items from your employer's files?

“A. Yes, I do identify this as excerpts from our records.

“Q. And does it appear to have been compiled as reflected on the face in July, 1954?

“A. Yes, sir, it does.

“Q. Do you know from whatever source or use that have been made of that pamphlet or that exhibit?

“A. Only by hearsay.

769 “Q. What is that, according to your information?

“A. That is a definition of retail sales.

“Q. And would you have that marked as Exhibit 5, to your deposition, please?

(The said document was marked as Deposition Exhibit No. 5, Witness Curry, by the Notary.)

By Mr. Mitchell:

“Q. Mr. Curry, in the course of your deposition, you have used one or two terms that I would like to inquire about. One of them was ‘fleet account sales’. Are those classified as consumer sales or sales for resale by your record?

“A. They are classified as consumer sales.

“Q. And would you tell us briefly and generally what does the term ‘fleet sales’ mean? How is it derived?

*Testimony of Ted Curry*

“A. Fleet sales consist of those companies or individuals in any given market that have pieces of equipment, and who have enough volume to justify regular solicitation, whose purchases are great enough that they justify regular calls.

770 “Q. Are the prices at which Goodrich products, and specifically tires and tubes, will be sold by dealers or by Goodrich stores to such fleet accounts rigidly fixed or stabilized in any way by your employer?

“A. No, sir, they are not. The entire industry, competition forces the prices.

“Q. I think it would be certain that much freedom would have to be given to your independent dealers who handle Goodrich products in connection with these fleet sales, and fleet attempts. Is considerable latitude also given to your managers and others in your own company's retail stores?

“A. Yes.

“Q. With regard to such sales?

“A. Yes, sir, it is.

“Q. And again, I take it that it is a matter of competitive forces at a particular time and place?

“A. That is correct.

“Q. Which dictate how the price is set?

“A. That is right

Mr. Mitchell: I believe that is all.

**Cross-Examination,**

By Mr. Tineher:

771 “Q. Mr. Curry, am I correct in assuming that these forms which have been made Exhibits 1, 2, and 3 to your testimony are used only by your company in the operation of its company-owned stores?

“A. Yes, sir.

“Q. And the instructions set out in Exhibit No. 4

*Testimony of Ted Curry*

relate to these leases of premises for company-owned stores?

“A. That is correct, sir.

“Q. Then, your testimony has not related to franchised dealers?

“A. No, sir.

“Q. How many company-owned stores does the B. F. Goodrich Company have in the United States?

“A. Under the name B. F. Goodrich, 445.

“Q. Does it operate other company-owned stores under another name?

“A. There is an arrangement and I am not too familiar with it, in its operation of leased departments. They are departments that operate in conjunction with several department stores.

“Q. That was four hundred and how many?

“A. Four hundred and forty-five.

“Q. Do any of those 445 company-owned stores  
772 under the name of B. F. Goodrich sell more than 25 per cent of their gross business for resale?

“A. I will have to answer that question on the basis of not having complete information. Some of them do, and they are so recorded where they do.

“Q. In other words, you do have some B. F. Goodrich stores, then, 25 per cent or more of whose business is sold for resale?

“A. Yes, sir, there are some. How many, I don't know.

“Q. Now, Mr. Mitchell's questions and your answers related to retail stores. Would you include in that term retail stores those stores you have just described as doing more than 25 per cent—

“A. Yes, sir, that is included in the total.

“Q. Are any of those stores which would do as much as 50 per cent of their business sales for resale?

“A. I cannot answer that question. I do not have that information with me.

*Testimony of Ted Curry*

"Q. But if it is between 25 per cent and 50 per cent, you would still include the store as a retail store?

"A. Yes.

773 "Q. Do you know whether any of those stores might exceed 50 per cent of their sales?

"A. No, sir, I do not have that information.

"Q. Does B. F. Goodrich Company have tire distributors who are known in the trade as franchise dealers?

"A. Yes, sir.

"Q. Would you be able to say approximately how many such dealers the company has in the United States?

"A. No, sir, I can't. I am not in that division of the company, and I hear figures but I don't know whether they are right or not. I would not want to put them in the record.

"Q. Would you know whether it is more or less?

"A. There are more than there are company operations.

"Q. Would you think it is twice as many more?

"A. I would say there are more than twice as many more.

"Q. Now, Mr. Curry, would you know whether any of those franchise dealers derive more than 25 per cent of their gross revenue from sales of tires and tubes for resale?

"A. I do not have those figures.

"Q. From your knowledge of the company's distribution system, would you express an opinion as to whether there are some such franchised dealers?

774 "A. From knowledge of the business, I would say there is, yes, sir.

"Q. And would you classify such dealers whose sales for resale constitute more than 25 per cent of their gross revenue as retail establishments?

"A. Would you restate that question, please, sir?

Mr. Tinker: Will you read the question, please?

*Testimony of Ted Curry*

(Question read.)

The Witness: That is an extremely hard question for me to answer. I have nothing to do with the wholesale part of our business. I would think that some of those dealers would be so classified as retail.

By Mr. Tinscher:

“Q. You are basing that answer on the same consideration—

“A. On the same premise that I do for our stores.

“Q. Yes. In your treatment of your merchandising, do you have any percentage point at which you break off to distinguish an establishment as being either wholesale or retail in your industry?

“A. No, sir, not to my knowledge.

“Q. Do the B. F. Goodrich Company's franchised dealers supply tires and tubes to the company's fleet  
775 national accounts in the same manner that the company-owned stores do?

“A. That program is available to them and generally they do. They participate in that program.

“Q. When a franchised dealer delivers to one of the fleet national accounts a number of truck tires, for example, does the dealer bill that national account for the sale?

“A. I am not familiar with all of the mechanics of that transaction. It is my understanding that he bills the tires back to the company and the company then bills the national account.

“Q. You don't know of any exception to that practice?

“A. No, sir, I do not.

“Q. Now, would you explain the basis on which a franchised dealer who bought tires from the B. F. Goodrich Company would deliver them to, for example, the Coca Cola Company, and then bill the transaction back to B. F. Goodrich Company?

*Testimony of Ted Curry*

"A. Would you read—

Mr. Mitchell: We would object to that question, unless you would tell us how you are classifying the Coca Cola Company, in what category of purchase your  
776 question assumes that.

By Mr. Tincer:

"Q. That was a fleet national account, assuming that Coca Cola would be one of the B. F. Goodrich Company's accounts.

Mr. Mitchell: I have no idea the intricacies of those. I think at random, the Coca Cola Company might have a distinguishable arrangements with B. F. Goodrich, some arrangement distinguishing it from other national accounts. If so, I think the witness ought to explain that to clarify the context of his answer.

(Question read.)

The Witness: I do not know the answer to that question. In my 20-odd years, I have never been in the wholesale division, neither have I followed the mechanical procedure of billing through.

By Mr. Tincer:

"Q. Do you know whether the fleet account sales of B. F. Goodrich are all handled under the wholesale division of the company?

"A. You are referring to fleet national accounts, as  
777 we call them, DFB.

"Q. That is right.

"A. May I qualify the question?

"Q. As much as you like.

"A. We are operating two divisions. I say this to make perfectly clear. The retail group with which I am associated and a dealer sales group. The dealer sales group handles—their dealers handle some of the fleet national accounts, stores handle some of them.

"Q. Are there two different classifications, then, of your fleet national accounts?



*Testimony of Ted Curry*

"A. No, sir, they are all the same classification.

"Q. Well, when those sales are made through the company-owned stores over which you have control, as I understand it, are they considered retail sales or whole-sale sales?

"A. They are not considered sales at all so far as the store is concerned. The store is a delivering agent and those sales are billed by the fleet national accounts group.

"Q. How are they considered by B. F. Goodrich Company, without reference to the company-owned stores?

"A. I can't answer that as to how it goes into the corporate statement.

778 "Q. And do you know whether it is handled in the same way for the dealer sales group that it is handled for your group which is the work of the company-owned stores?

"A. It is my opinion that it is.

"Q. Mr. Curry, you identified your Exhibit No. 5 as containing material relating to a definition of retail sales which you understood through hearsay only. Could you tell me whose definition that was that you had by hearsay?

"A. In this?

"Q. Yes.

"A. It is my understanding that this was prepared by the management of our company. I say that because I recognize these pieces that are in here as coming from company publications.

"Q. Are you in a position to pass upon whether the definition of retail sales as contained in Exhibit No. 5 is a correct economic definition of retail sales?

Mr. Mitchell: Could you refer to the particular part of the rather conglomerated Exhibit No. 5 so that Mr. Curry will know what specific definition, if any, that you refer to?

779 By Mr. Tinchler:

"Q. My question, Mr. Curry, related to your

*Testimony of Ted Curry*

answer which I noted down at the time you were answering Mr. Mitchell's question, that Exhibit 5 contained a definition of retail sales?

"A. Yes, sir.

"Q. I want to know, first, and I believe you have answered that it is your company's definition of retail sales, is that correct?

"A. Yes, sir.

"Q. Now, from whom did you get the definition of retail sales?

"A. This is a commonly known thing in the industry. To tell you exactly where I first learned it would be almost impossible. It has been known to me throughout my years in the industry.

"Q. And you have become acquainted with it, I take it, through your contacts with people in the B. F. Goodrich organization?

"A. Yes, sir.

"Q. Are you an accountant, Mr. Curry?

"A. No, sir, I am not.

780 "Q. Have you pursued any study in the field of merchandising?

"A. Only the studies as developed through training with B. F. Goodrich Company.

"Q. Would that include any graduate study at the University of Akron?

"A. No, sir, it does not.

"Q. Could you tell us how the prices which are charged to the various customers who fall within this group of the fleet national accounts compare with the prices which your franchised dealer, for example, would charge to a subdealer for tires that he sells to be resold?

"A. No, sir, I could not, with accuracy.

"Q. Generally speaking, isn't it as low or lower than the dealer's price of tires for resale?

*Testimony of Ted Curry*

"A. I don't think you can say that because as I understand the fleet national situation, these accounts are priced to some degree on the basis of the service that is rendered to the account.

"Q. Does your franchised dealer have anything to say in arranging for what service he will be performing in supplying the national account customers?

781 "A. My answer would have to be on hearsay, since I am not in that department. It is my opinion that franchised dealers are consulted about the arrangements that are made with national accounts.

"Q. You would know about your company-owned stores. Are those dealers and distributors consulted in arranging for the service that would be supplied along with the delivery?

"A. You are referring to company stores, not dealers and distributors?

"Q. Yes.

"A. Company stores are consulted about the pricing arrangement to national fleet accounts, generally where the home office is in a store market, where that store is apt to handle a large percentage of that business.

"Q. But if the particular store is in an area where only a small amount of business is done with national fleet accounts, he might not be consulted, you say?

"A. He might not be.

"Q. Is the percentage of commission paid to your store operator the same in all instances on these fleet national accounts, or does that percentage vary?

782 "A. It is my understanding it is all the same.

"Q. Would that be true even though I assume that service which he performs in addition to delivering the tires would vary from one account to another?

"A. It is my understanding that it is still the same.

"Q. Could you say whether that is true also with reference to the franchised dealers?

*Testimony of Ted Curry*

"A. No, sir, I cannot.

"Q. Who in your organization would hold a position similar to yours, but with reference to your dealer sales group, Mr. Curry?

"A. I think the person that you want the name of would be A. E. Senne.

"Q. Is he comparatively new in that position?

"A. Yes.

"Q. Who was his predecessor in that position?

"A. That is a newly created position.

"Q. How recently created, Mr. Curry?

"A. Within the past 90 days.

"Q. What was the organizational setup with reference to overseeing the activities of your franchised dealer group prior to this organization?

(Discussion off the record.)

783 By Mr. Tincher:

"Q. Does the B. F. Goodrich Company have more than one wholesale price that it makes available to its dealers and store operators?

"A. Store operators are all on the same cost basis. I cannot answer for the dealer organization. I am not familiar with your structure.

"Q. Does the company limit the price or circumscribe the company-owned store dealer in any way as to the price he can charge?

"A. No, sir.

"Q. To subdealers?

"A. No, sir, we do not.

"Q. Is he free to set that price wherever he wants to?

"A. Yes, sir, to my knowledge.

"Q. Mr. Curry, I notice in Exhibit No. 4 of your testimony, this paragraph: This is on Page 2, the second paragraph within the portion that you marked. 'The term "net retail sales" is defined to mean the amount of net

*Testimony of Ted Curry*

retail sales or merchandise or services sold by the tenant on the demised premises after the deduction of terms, discounts, and allowances, and excluding city, county, 784 state, and federal sales.'

"A. I am not following you on that. Now, I am with you.

"Q. My question is: Do you know why city, county, state, and federal sales are excluded from this group defined as net retail sales?

"A. I cannot give you an answer to that. I do not have it.

"Q. In your organization, do you have a price list for sales to the city, county, and state governments which is known as the state list?

"A. We have printed a state list. I am not familiar with a list being printed for city or county.

"Q. Do you know whether that state list is used generally as the price list for which comparable merchandise is sold to city governments and county governments?

"A. I do not know that to be a fact. I have heard that that is so.

"Q. Well, from your experience with the business, do you find that generally that would be the category in which city and county sales would fall?

"A. I cannot make that as a general statement, but when you say cities, you are covering a wide range of cities and a wide range of circumstances.

785 I do know that it has been done, but to what extent, I cannot say.

"Q. Once a deal is made to the city or the county or the state, does your company treat such a sale as having been a retail sale?

"A. Would you restate the question?

"Q. When sales are made by your stores to a city or a county or a unit of the state government, does your company treat that as a retail sale?

*Testimony of Ted Curry*

"A. I don't want to keep dogging you, but would you ask it one more time and I hope you can put the words in there.

"Q. I want to get in such form that you can understand it. Assume that one of your company-owned stores makes a sale of tires to a county or a city government, or to a unit of the state government at the state list price, does your company treat that sale as a retail sale?

"A. That is still a retail sale because that merchandise is being used by the purchaser.

"Q. Then, in your definition, it is a retail sale?

"A. It is a retail sale because it falls within that classification of merchandise that is being consumed by the purchaser.

786 "Q. And are you familiar enough with your company's accounting practices to know whether it includes that sale?

"A. No, sir, I am not. I am not familiar with that.

"Q. And I believe you said you don't know why such sales were excluded as stated in this paragraph I read from, your Exhibit No. 4?

"A. That is right.

"Q. Have you had occasion to check any state lists that are followed by your company in making sales to state governments?

"A. Not recently.

"Q. When you did, how did the price or the prices shown on such a list compare with the prices to your smallest dealers and subdealers?

"A. I can't answer that question. I do not recall.

"Q. Now, with reference to Exhibit No. 1, you have a category shown as retail and then you have a category shown as commercial which you said is also retail?

"A. Yes, sir.

"Q. Could you give us a distinction or tell us whether

*Testimony of Ted Curry*

there is a distinction between the retail group,  
787 and the retail commercial group.

"A. We make that distinction for this reason that there are truckers and lists of truckers in each market. We hire commercial salesmen who solicit commercial accounts, fleet accounts, and as one yardstick or one measure, we maintain this record to find out what our results are with that particular group of people.

"Q. Why do you want to keep that information in a separate category, Mr. Curry?

"A. These are people who buy frequently and whose volume of purchases are such that it justifies our regular solicitation.

"Q. And does your company take into account the volume of their purchases and the regularity and frequency of their purchases in setting the price that is charged to those customers?

"A. No, sir, it does not. That price is determined by the market situation.

"Q. I take it that the B. F. Goodrich Company would not sell to any of those fleet national accounts at a price which would be less than the cost of manufacturing and distribution involved?

"A. I cannot answer that question except to say  
788 that I don't think they would.

"Q. But assuming that they will make such sales only at a price which will yield some measure of profit, are you saying that the amount of profit is determined by the competitive situation and the difficulty that your company would have in selling that particular account in view of prices that your competitors might offer?

"A. Yes, sir, yes, sir, I am saying that.

"Q. Well, could you say whether the sale price of a particular type of tire in the retail retail category would be the same or greater or less than the sale price of the same type of tire to a retail commercial account?

*Testimony of Ted Curry*

"A. Would you restate your question? I think I understand it, but I want to be sure.

Mr. Tinchler: Let's have the reporter read it.

(Question read.)

The Witness: It could be greater, it could be less, depending on the market.

By Mr. Tinchler:

"Q. Could the sale price to your commercial account in some instances be less than the sale price to the dealer of that particular tire?

789 "A. I couldn't answer that question.

"Q. You know, as a matter of fact, that it is many times, don't you, Mr. Curry?

"A. Well, off the record?

(Discussion off the record.)

By Mr. Tinchler:

"Q. Go ahead and make your statement for the record, then.

"A. That is a question about which I do not have direct knowledge.

"Q. Don't you have general knowledge though, from your acquaintance with the business and the years you have been with the B. F. Goodrich Company?

Mr. Mitchell: I believe, Mr. Tinchler, this witness has tried obviously to give you information where he has it. He has qualified some of his answers out of necessity where he does not base it on personal knowledge or experience. I believe he has twice, now, tried to give you an explanation for his inability to answer a question. You have repeated at least twice, and I think that should be sufficient for the record.

(Discussion off the record.)

790 Mr. Mitchell: Let the record show, if I may, gentlemen, that in an off-the-record discussion, upon the suggestion of a question by Mr. Suntum that his own



*Testimony of Ted Curry*

participation in or experience in sales to fleet accounts at prices comparable to those of dealer prices, his experience would go back more than or equal to a period of ten years, and that within the limited recollection of such experience, he can recall no instance when, as a store manager, he sold to a fleet account at a price less than dealer price.

If you think that is not a fair summary, I will welcome adjustments.

By Mr. Tinch:

“Q. Now, Mr. Curry, with that statement, can you recall that some of the fleet accounts were sold at prices as low as the price to your subdealers?

“A. You are referring to associate dealers in the store?

“Q. Yes.

“A. No, I cannot, at that time.

“Q. When you were connected with company  
791 stores at district level, did you have access to the information showing the price at which the company was selling its national fleet accounts?

“A. No, sir, I did not.

“Q. You wouldn't be able, then, to compare that price to the prices to associate dealers, would you?

“A. No, sir, I can't.

“Q. Do you have information now since you are working in the home office of the company from which you can make such comparisons?

“A. Yes, sir, I can.

“Q. Will you tell us how the price, the representative price or customary price to the company's fleet national accounts compares with the price to associate dealers of the company?

“A. I have not made such a comparison.

“Q. But you do have access to the information?

“A. I have access to those records, yes.

*Testimony of Ted Curry*

“Q. Well, without having made a specific comparison, do you know from your contact with that information or from having it available to you how those prices compare?

792 “A. It is my opinion that the prices to the fleet national accounts are somewhat higher than those we charge dealers.

“Q. When a local manager for a company that is sold tires on a national account basis needs some tires, does he communicate his order to the company home office or to the local dealer?

“A. You are referring to those instances where the individual wants the tires for his own car?

“Q. No, in any local manager, we will say, district manager, plant manager, or terminal manager of some company that has a national account arrangement with your company. Where does he get his tires and how does he get his tires?

“A. For his fleet or for himself?

“Q. For his business, for his fleet?

“A. He will draw a requisition through his company, or a purchase order, and present that order to our dealer or our store.

“Q. And then the delivery is made there?

“A. By the dealer or by the store.

“Q. Does B. F. Goodrich Company keep sales representatives in the field constantly to contact these  
793 fleet national account managers, or the people who deal with you on a national account basis?

“A. The home office people, yes, they do.

“Q. Do they, in that solicitation, also call on your franchised dealers or your store operators?

“A. Off the record.

(Discussion off the record.)

The Witness: Yes, they will contact the stores or the dealers to improve relations and service.

*Testimony of Ted Curry*

Mr. Tineher: I think that is all the questions I have, Mr. Curry.

Mr. Mitchell: I have just one point, Mr. Curry.

**Redirect Examination,**

By Mr. Mitchell:

“Q. Several questions were addressed to you on cross-examination with regard to sales to states or local governments and the reason for whatever distinction there may be by your company between such sales and other sales to consumers, from the context of your answer, 794 it is apparent that you are not intimately or personally familiar with this. I simply want to ask: Are you familiar, from whatever experience with your company you may have had, with the practice of inviting bids and having bids submitted by manufacturers or retailers to city, state, county governments?

“A. Only by hearsay.

“Q. Do you know whether or not some distinctions that may appear in your company records would have reference to such a practice and would consider bids submitted on invitation by some governmental authority as distinguishable from other sales to consumers?

“A. I do not know that.

Mr. Mitchell: That is all.

Mr. Tineher: No further questions.

(Deposition closed at 3:30 p. m.)

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*Testimony of Milan Zaveson*

796      **DEPOSITION OF MILAN ZAVESON.**

\* \* \* \* \*

798      **MILAN ZAVESON,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

“Q. Will you state your name, please?

“A. Milan Zaveson.

“Q. What is your home address, sir?

“A. 1837 Carter Avenue, Akron 19.

“Q. Just for the record, in the State of Ohio?

“A. Yes.

“Q. What is your present title or position and with which employer?

“A. I am the general auditor of the General Tire and Rubber Company.

“Q. Are your offices in the home office of General Tire and Rubber Company here in Akron, Ohio?

“A. Yes.

“Q. Would you give us your office address?

“A. 1708 Englewood Avenue, Akron, Ohio.

“Q. For how long have you been employed by the General Tire and Rubber Company, Mr. Zaveson?

799      “A. Since September, 1937.

“Q. Prior to your employment by General Tire and Rubber Company, did you work in some other part of the rubber industry?

“A. No, sir.

“Q. What was your first position with the General Tire and Rubber Company?

*Testimony of Milan Zaveson*

"A. Bookkeeper and accounts payable clerk.

"Q. In what office?

"A. In the Akron office.

"Q. Have you been employed in the Akron, Ohio, office of General Tire and Rubber Company at all times since 1937?

"A. Yes, I have.

"Q. For about how long did you hold this position as bookkeeper and clerk?

"A. From 1937 to 1941, I worked as a bookkeeper and accounts payable clerk, and during that tenure, I don't know at what time, but I became head of that department.

"Q. In 1941 did you advance to a different position?

"A. In 1942, I went in as an audit clerk, in the Auditing Department.

800 "Q. And what, generally, were your duties as auditing clerk during and after 1942?

"A. I did several things. One, I developed the audit program a little bit stronger for our general program, and I also worked in the area of developing the field program which had to do with the audit of our warehouses, our stores, and our branches.

"Q. And for how long did you hold that type of position after 1942?

"A. I stayed in that work up through 1945.

"Q. And at which time, what position did you take?

"A. In 1946, I went back and managed the Accounts Payable Department.

"Q. For what period of time, sir?

"A. One year.

"Q. And thereafter, what did you do?

"A. Came back into the Auditing Department.

"Q. And for how long did you stay and in what position at that time?

*Testimony of Milan Zaveson*

“A. From 1947 on until 1954, I worked in further developing the same program that I had previously started doing, and also went out in the field and did some  
801 work myself in the field.

In 1954, I became a general auditor.

“Q. Prior to 1954, you indicated that you went out into the field, I take it doing regular audit work?

“A. Yes.

“Q. In that connection, did you call upon and investigate or examine the books and records of your company's stores as well as warehouses or other parts of its establishment?

“A. Yes.

“Q. And that extended until 1954, I believe you said?

“A. Yes.

“Q. At that time, did you advance to the position of general auditor?

“A. Yes.

“Q. And that is the position you still hold?

“A. Yes.

“Q. I take it from the title that yours is the top auditing position in the accounting setup of your firm, General Tire and Rubber Company?

“A. That is correct.

“Q. In that position, am I correct in thinking you would be responsible for whatever internal audit procedures the  
802 classifying of records, examination of records of your company at its several levels?

“A. Yes.

“Q. That may be carried out?

“A. Yes.

“Q. I think it would be apparent from your answer that this is true, but just for the record, that would include the setting up of and examination of records in your company-owned stores?

*Testimony of Milan Zaveson*

"A. Setting records for our use and not for—if we were setting records for that use, it would be on a recommendation basis. For our purposes, we establish the records that we believe feasible.

"Q. To the extent that your company deems a particular system or class of records important to its control of such stores—

"A. Right.

"Q. —that would fall under your direction?

"A. Yes.

"Q. The setting up of a system and the periodic examination of records that your company felt pertinent?

"A. Yes.

803 "Q. Mr. Zaveson, are you familiar with the accumulation of an exhibit from accounting and other records of your company in 1954, which work, I suppose, must have been carried out in conjunction with the law department of your employer, General Tire and Rubber Company, for presentation to some part of the Wage and Hour Division?

"A. Yes, I am, and this is it right here. I worked on that—you say 1955. I am not too sure of the date. I did work with our legal department in this area.

"Q. Would you turn to General Exhibit 1 of a pamphlet that you have just referred to?

"A. Yes.

"Q. And see a letter dated June 3, 1954. Would that help you recall?

"A. Right.

"Q. That the letter, made Exhibit 1 to this pamphlet, was current at the time it was prepared?

"A. Yes.

"Q. I will ask you if you will make this pamphlet Exhibit 1 to your testimony, please, sir?

"A. Yes.

*Testimony of Milan Zaveson*

(The said document was marked as Deposition Exhibit No. 1, Witness Zaveson, by the Notary.)

804 By Mr. Mitchell:

“Q. Now, then, Mr. Zaveson, you have already indicated that you participated in the accumulation and preparing of this sheaf of documents that has now been Marked Exhibit 1 to your deposition. Would you just look through it and tell me whether or not it is an accumulation of bulletins or accounting forms from the records of General Tire and Rubber Company which had been in use during or prior to 1954?

“A. Yes, these are the records that we used at that time.

“Q. And, Mr. Zaveson, I will ask you to turn to the first item in this sheaf of documents which has been made Exhibit 1 to your deposition, which item is a three-page typewritten writing entitled ‘Notes Regarding Exhibits of the General Tire and Rubber Company,’ and I will ask you to look down about two-thirds of the way down, the opening paragraph of that particular writing and find the statement which starts, ‘General treats all sales by its stores as retail sales in the first instance and subsequently breaks out such sales so that sales to sub-dealers are separately treated,’ and continuing, ‘In its treatment of tire sales to commercial accounts, Gen-  
805 eral recognizes all such sales as retail sales, ir-  
respective of the number of tires purchased, the character of the purchaser, the price paid, or the use to which the tires will be put.’ Do you find that statement at the place indicated in your Exhibit 1?

“A. Yes, I do.

“Q. And over at the end of the same set of notes in the same exhibit, do you find the statement, ‘General has uniformly treated its sales as in two classes: Wholesale sales to subdealers and retail sales to consumers and has



*Testimony of Milan Zaveson*

treated all sales to commercial accounts as retail sales.'  
Do you find that statement?

"A. Yes.

"Q. With regard to those statements, I will ask you first, sir, if as would be apparent from their position in this record, does that represent the statement of your employer's position at the time that this memorandum was prepared and submitted?

"A. Yes, it does.

"Q. Do you know whether or not those statements continue to represent your employer's position today on the subjects covered?

806 "A. I would say they are almost exactly the same.

"Q. In other words, the definitions or classifications stated in the parts that I have just read from this Exhibit are current and are accepted today by your company?

"A. I would say so.

"Q. Now, from your experience since 1937 in the tire industry as an employee advancing up to an executive position in the Accounting Department of General Tire and Rubber Company, and based upon your experience as an auditor in the field, does that also reflect your own recognition and your own classification of sales by your company stores?

"A. Yes, it does.

"Q. This was written, was it not, with respect to the retailing done by stores owned, managed, and operated by your employer, General Tire and Rubber Company?

"A. Yes.

"Q. From your experience with and knowledge of independent tire dealers who may have a franchise or another arrangement under which they sell General Tire and Rubber Company products, would you say that the same classifications are true and the same definitions pertain?

*Testimony of Milan Zaveson*

807 "A. Yes, that is a basically—they are basically the same.

"Q. Would you go through the sheaf of documents which has been made Exhibit 1 to your testimony and indicate what the several exhibits in it are. The first item which I have just read from and the title which I have given is, I believe, self-explanatory?

"A. Yes.

"Q. Now, then, following that, there is that which is marked 'General Exhibit 1' and appears to be a letter addressed to all retail stores dated June 3, 1954. Would you state what the significance of this would be?

"A. This, at the time we were working on this, was to establish our retail stores and this is produced as evidence that we do class our stores as retail stores and they are supervised by a manager of retail stores.

"Q. And would you next turn to the General Exhibit 2, so entitled, headed in bold type, 'Billing Instructions' and tell us what the significance of it may be?

"A. This had to do with our subdealers and some of our stores could have subdealers.

"Q. Would you explain briefly what that term means?

808 "A. Well, a subdealer would be possibly a small operator within the same town as the retail store, and he may—the dealer, in expanding his business, may tie in this fellow to do business, and if they properly recorded with us, they would participate in the commissions on making deliveries to these guys at the retail level.

"Q. Am I correct in thinking, Mr. Zaveson, that the sales to these sub-dealers which you have just described and which are referred to on this Billing Instructions made General Exhibit 2 in the sheaf of documents we are talking about, would represent the kind of sales for resale

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which are referred to in the definitions earlier in this same exhibit?

"A. I would say so.

"Q. And pursuant to that definition and to your understanding of the usages in the industry, that would be the only type of sale that your stores might make that would be classified as a wholesale or, in any event, a non-retail sale?

"A. I would think so, yes.

"Q. Now, then, would you, without going into great detail explain the general use and function of that  
809 which has been marked Exhibit 3 to this sheaf of documents, and state what it is?

"A. This is our financial statement used by our retail stores at this time.

"Q. In that connection, sir, would you indicate the date on it so that we may know when it was in current use?

"A. This was August of 1945, this particular one here.

"Q. All right, sir.

"A. It is produced on a local level for purposes of their records and then it is sent into Akron also for purposes of our records for consolidation.

"Q. When you say it is produced on the local level, do I construe that properly to mean that the information is entered at a retail store?

"A. Yes.

"Q. By a bookkeeper or clerk?

"A. Yes. Our retail stores are autonomous. They have their own complete set of accounting records.

"Q. And this is an operating statement that was in use at least during August, 1945, and thereabouts?

"A. It is an operating statement and balance sheet also.

"Q. All right.

"A. We have added expenses to keep it whole.

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810 "Q. Thank you for that. In the event that I incorrectly refer to anything in these records, I would appreciate your elaborating on it or point it out. This set of documents, then, represents the kind of accounting records that would be submitted and were submitted by one of your stores—any one of your stores?

"A. Yes.

"Q. To the home office of General Tire Company in the regular course of business?

"A. That is correct.

"Q. Now, then, I believe that covers over to the next which is Exhibit 4 that bears the date August, 1949, and would appear to be the same general kind of operating statement, balance sheet, and so forth which you have just described.

"A. That is correct.

"Q. Do I understand this to be simply the example of the kind of accounting form that was used during and about August, 1949?

"A. That is correct.

"Q. For the same purpose?

"A. Yes.

811 "Q. Now, then, sir, would you turn to that which is marked General Exhibit No. 5 in the sheaf of documents which has been made Exhibit 1 to your deposition and describe it, please.

"A. This is a page of a manual used by our Billing Department as manual instruction that would go out to our billing points, as to the method that they should bill.

"Q. And it would seem from its title that it relates to this subdealer program. Do I construe that to mean the same thing you were talking about a short while ago in connection with another exhibit?

"A. That is correct.

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"Q. Namely, the same by one of your stores to a sub-dealer in the store's community for resale by that sub-dealer to the public?

"A. That is correct. The billing instructions in this billing procedure manual, the billing instructions would go out very rapidly and later on become a part of the manual. This is a tie-in of the two.

"Q. And the reference which you just made is to that which appears as General Exhibit 2 and General Exhibit 5?

"A. That is correct.

812 "Q. Both of which are a part of what you now know as your Exhibit 1?

"A. Yes.

"Q. Is this billing procedure manual about which you have just testified, General Exhibit 5 in this sheaf of documents, still in current use by your company?

"A. Basically it is the same thing, yes.

"Q. All right, sir.

Now, then, would you turn to the last item of your Exhibit 1 and describe what it is, sir?

"A. This is again a balance statement and operating expenses which is a little more current than the previous one which you were shown. Basically, it is the same, but it is an up-dated form from the previous ones.

"Q. By current, I am sure you meant that it was current?

"A. At this point.

"Q. In July, 1954, when this whole exhibit to your deposition was accumulated and prepared?

"A. That is correct.

"Q. Now, you have already indicated that you participated with others in the employment of the General Tire and Rubber Company in the accumulation and preparation

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of what has been made Exhibit 1 to your deposition.  
813 Do you remember generally the use to which this exhibit was to be put?

"A. It was produced for the purpose to establish with the Labor Department that our retail outlets were retail outlets and not wholesalers. I think that may be right in here that in this first page of this same booklet—in fact, there are two spots that really bring this out. That is where we say, 'General regards itself as the wholesale and its independent dealers and company stores as exclusively retail outlets except to the extent that they resell to some dealers.'

"Q. Yes.

"A. Then, again, I think we stated back here in the summary it brings it out very strongly in the same way, but basically this is what we were working on and established these exhibits to bring that point out.

"Q. In short, then, sir, this Exhibit 1 to your deposition was prepared in July or thereabouts, 1954, to express the position of General Tire and Rubber Company with regard to the nature of the operation of its company stores, and to illustrate how its own records—

"A. Yes, sir.

"Q. —supported its position?

"A. That is correct.

814 "Q. And you recall that it was used in connection with some presentation to the Department of Labor?

"A. That is correct.

I might say this that the reason the legal department asked me to work on this stuff was because of my familiarity with all lines of it. We have people that might be familiar in certain areas, like our billing people would be familiar with billing, where in my position, we cross all lines.

"Q. Now, then, sir, at my request, have you brought

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in examples of records that are in current or immediately past use by General Tire and Rubber Company in connection with the suggested system of accounts to be used and followed by your company stores and with regard to the reporting of business done at your company stores to the home office?

“A. Yes, I did.

By the way, as far as our company stores are concerned, this system is not a suggested system, it is a system that must be used.

“Q. Thank you, sir, again, for that clarification. The records to which I just referred and which we will shortly introduce are those that are furnished by your company stores?

“A. Yes.

815 “Q. And am I correct that this system is offered to your independent tire dealers who may or may not take and institute the system?

“A. Yes.

“Q. One other item here, please, sir. I noticed in the notes which are the first writing in your Exhibit 1, it is indicated that General Tire and Rubber Company in 1954 operated 69 company stores through a separate controlled subsidiary corporation for each store. Do you know the number today of the General Tire and Rubber Company stores?

“A. I use a different figure than possibly the records might indicate, and I will explain that. There are a little over 200. Now, I use a figure of 250 and the reason I do that is because you take Cleveland as an example; we have a retail store there. That store then has five branches. For my purposes of the work I have got to do, those branches to me are just as much work as the main store. In my category, I would say there are approximately 200,

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with another 50 of the type that I am talking about, with branches.

“Q. So that your figure of 250 would represent the actual number of locations?

“A. Yes.

816 “Q. But not necessarily the actual number of separate stores?

“A. Yes, and this is now an estimate. I would have to actually check.

“Q. I can appreciate that.

“A. It is close to that.

“Q. Now, with regard to the balance of this statement from the notes in your Exhibit 1 that these stores are operated through separately controlled subsidiary operations, that I am sure is true since it was stated in 1954. Does that continue to be the method of the operation of company stores by General Tire and Rubber Company?

“A. In some instances, yes.

“Q. With regard to the records I have asked you to bring in, I first hand you photostats or photocopies of accounts headed ‘Retail Stores Department Chart of Accounts,’ and I will ask you to summarize briefly and state what that may be?

“A. In accounting circles, you always work from a chart of accounts, and this is the established record that we use and the account numbers to classify items in our retail stores.

817 “Q. And does this summarize the system of accounts that is followed in your retail—in the company-owned or company-operated retail stores?

“A. Yes.

“Q. Is it similarly the system of accounts that is offered to your independent dealer?

“A. Yes.



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“Q. Would you make that Exhibit 2 to your deposition, please?

“A. Yes.

(The same document was marked Deposition Exhibit No. 2, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

“Q. With regard to your Exhibit 2, please, sir, would you state whereabouts on it the sales breakdown is shown and how sales are classified in accordance with this system of accounts?

“A. Take the second there, the right hand side, you will see a major category of captions, trading accounts, starting out with account 100, sales accounts, and then our breakdown of sales, and we are interested in the 818 amount of new General trucks, new General passenger, et cetera, down the line. This is the type of classification we use in our sales accounting.

“Q. I take it, then, that in accordance with this system or chart of accounts, all sales, regardless of the type of purchase, would be entered through the same ledger accounts, and that such accounts are numbered 101 through 116?

“A. That is correct.

“Q. And your identification of classification of sales is by type of product rather than by type of customer?

“A. That is correct.

“Q. Is that constant, sir, with this idea that all sales through your retail—the company’s retail stores are considered to be retail sales in the first instance, and then to the extent that any sales are made for resale, those are later adjusted out of your sales account and represent the only other category of sales?

“A. Yes, sir.

“Q. Now, then, sir, at my request, have you brought in a blank invoice form?

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“A. Yes.

819 “Q. Could you please describe generally its function and regular use?

“A. This is a standard invoice form that we use in all of our retail stores, and it is for the recording of all the sales as shown on this Exhibit 2 that we just talked about.

“Q. Right. Would you make that Exhibit 3 to your deposition, please?

(The said document was marked as Deposition Exhibit No. 3, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

“Q. Now, then, sir, with respect to that which is now marked Exhibit 3 to your deposition, you have stated that this is the invoice form and I take it it is the one written up by the clerk or salesman at the time a sale is made?

“A. Yes.

“Q. Is there any place on it by which the type of sale classified according to a particular customer is noted or is indicated?

“A. No, sir.

“Q. So that a sale to any account or any customer, regardless of whether it is for resale or not would be entered and written up originally on the invoice form made  
820 Exhibit 3 to your deposition?

“A. That is correct.

“Q. Now, then, sir, moving on through the system of accounts, you have brought in at my request an accounting spread sheet headed ‘Daily Summary of Sales and Collections,’ and I will ask that you make that Exhibit 4 to your deposition?

“A. Yes, sir.

(The said document was marked as Deposition Exhibit No. 4, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

“Q. With regard to that which has been marked Exhibit

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4 to your deposition, sir, would you please state first what its general purpose and function may be?

"A. This what we would call part of our books of original entry. The function of that sheet is to summarize the invoices and receipts. We use both in here because it is a combination sheet.

We summarize all the invoices so that we can classify, again, the various items, and if you take a look at the sheet, you can see where you have got a place for invoice number.

821 "Q. For the record, sir, are you referring to the reverse side of this sheet which is entitled in bold print 'Daily Summary of Sales and Collections'?

"A. Yes, sir.

"Q. All right, now, under that caption, go ahead, sir.

"A. Under that caption, you have got invoice or receipt number. Now, this Exhibit 3 would be recorded on this sheet, and this is then our control of numbers, also, and our classification which then becomes summarized on a monthly basis.

"Q. That was what I wanted to say. The summary or accumulation sheet made Exhibit 4 to your deposition, on its reverse side, would contain a restatement of the information which was originally entered on your Exhibit 3?

"A. That is correct.

"Q. The invoice itself?

"A. Yes.

"Q. And that would start with the invoice number in the far left column, and I take it the items sold according to such invoice would be spread across the page?

"A. That is correct.

822 "Q. Now, then, in spreading it, I see that the column heads are all entitled by names of product or types of product of General Tire and Rubber Company?

"A. Yes.

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"Q. For example, 'New General truck tires,—2'?

"A. That is right.

"Q. And so on across the page to 'Wheel Alignment' and other captions?

"A. That is correct. You also have the account number right above it that refers back to this chart of accounts.

"Q. Yes. Again, the classification here is by product rather than by purchaser or type of purchase?

"A. Yes.

"Q. And that is consistent with your company's position throughout?

"A. That is correct.

"Q. Throughout these accounting records?

"A. Yes.

"Q. And this indicates that it is a daily summary?

"A. Yes.

"Q. At what point is this prepared? At the company store?

"A. Yes, that is company store records.

823 "Q. Now, then, sir, you have brought in another type of record which is in three sheets. I hand it to you and ask you, generally, what it is and how it is used?

"A. This is the current form that we use for our balance sheet and profit and loss statement analyses of expense which I have shown. This is the current one in use.

"Q. May I interject here, sir, that you are referring to that which was entitled General Exhibit 6 in the pamphlet or sheaf of documents made Exhibit 1 to your deposition?

"A. That is correct.

"Q. And what you have just said is that which we will now introduce is the current version of this same type of form?

"A. Yes.

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“Q. Would you have it marked Exhibit 5-a, 5-b and 5-c to your deposition?

“A. Yes.

(The said documents were marked as Deposition Exhibit Nos. 5-a, 5-b and 5-c, Witness Zaveson, by the Notary.)

By Mr. Mitchell:

“Q. Now, then, sir, in connection with Exhibits 5-a, 5-b, and 5-c which together make up a single type of accounting form, at what point are these prepared? By point, I mean at the company store or the home office?

“A. At the company store.

824 “Q. For what interval or what period of time?

“A. They are made up each month.

“Q. And what is the name by which this system of reports is known?

“A. I don't follow you.

“Q. Is this a comprehensive accounting statement for the month?

“A. Yes, this is a balance sheet and profit and loss statement for the month and year to date.

“Q. Right, and would you indicate whereabouts on this set of records sales are reported and classified?

“A. They are reported on page 2, captioned Profit and Loss Statement.

“Q. And for our reference in the record, is that the lower part of the reverse side of Exhibit 5-a?

“A. It is both parts. It is top and bottom, the difference being the top is for the month, the bottom is year to date.

We carry that onto the next page also.

“Q. All right. That would be, then, the whole of the reverse side of 5-a, and 5-b on the face of it?

825 “A. And the reverse side of 5-b.

“Q. All right, now, then, that we have got it located,

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would you describe how the sales are reported and what categories and so forth are shown at this point in the statement?

"A. If you follow through, we started out with this Exhibit 3 which is posted to Exhibit 4.

"Q. Yes?

"A. Exhibit 4 is summarized by the month, and posted to what is commonly known as the general ledger. I don't have any exhibit here of the general ledger.

"Q. Yes?

"A. From the general ledger, this accounting statement, balance sheet and profit and loss statement is posted.

"Q. Now, we follow uniformly right straight through our classifications, and this summarization here is the final summarization, the determining of profit or loss in the store and also the classifications necessary, and it is consistent with what we have previously said here.

"Q. Right, and that is exemplified by the fact that this profit and loss statement for a given month which  
826 appears across the reverse side of Exhibit 5-a and the face of 5-b has as its first line 'Sales' and then by columns that extend to the right, first a total, and then a breakdown of that total, again, according to products?

"A. That is correct.

"Q. Now General truck tires and tubes, and next, new General passenger tires and tubes, and so on across the spread sheet?

"A. Right.

"Q. Again, is there any classification on this accounting report as to the character or type of purchaser?

"A. No, sir.

"Q. Does any other part of your Exhibit 5-a, 5-b, and 5-c relate to sales or sales analysis which we have not yet discussed?

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"A. I don't think so.

"Q. Now, then, also at my request, you have brought in an accounting form or statistical data form, perhaps, headed 'Monthly Sales Analysis' which I will ask you now to describe generally and state what purpose it serves?

"A. This is used as an aid to the managers to promote better sales, and they may or may not send this into  
827 the home office. This is a tool used basically for them to get some quick figures that they use. This is on the local level of the store manager. I don't have extra copies of this one, but these are basically what they are used for. The local manager uses them.

"Q. Well, from what you have just said, are for sales control purposes?

"A. Yes.

"Q. And I think you also indicated that they do not go to the home office to become a part of the permanent accounting records.

"A. Yes.

"Q. I will ask you to inspect them briefly, or from your own knowledge of them indicate whether or not there is any distinction or difference as far as classification of sales or putting sales into different categories according to purchases?

"A. No, there isn't.

Mr. Mitchell: Let the record show that we will not make this an exhibit, but it is available to counsel for adversary if you have any questions about it, or to make it an exhibit.

828 (Discussion off the record.)

By Mr. Mitchell:

"Q. Now, then, sir, at what point or whereabouts in this system of accounts exemplified by your Exhibits 2 through 5, inclusive, are sales for resale reported or adjusted out, or

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in what manner are they handled, and I mean sales for resale by your company stores?

"A. Well, this is the only way they are reported, the way they are right here.

"Q. And how are they—what adjustments are made to distinguish the sales for resale from sales to consumers?

"A. We still don't have any. This is the only type we have.

"Q. At any point in the accounting or control for your company stores or any purpose, is it important to General Tire and Rubber Company to segregate and to value the sales made by its company stores for resale?

"A. I don't follow you. Will you repeat that?

"Q. Yes, sir. Does it become important at any point or for any reason for General Tire and Rubber Company to know how much, that is the value of sales for resale to subagents, subdealers I believe the term is, by  
829 its own company stores?

"A. I don't think so.

"Q. In connection with, for example, the compensation of store managers, are sales for resale by the store treated any differently than sales to consumers?

"A. I don't think so.

"Q. Mr. Zaveson, the term 'national accounts' apparently is in regular use in the tire industry. Would you tell me generally what national account transactions consist of?

"A. Well, a national account is any outfit that might have trucks or vehicles that would need servicing any place in the United States. They might have a lot of them, a lot of areas, and these are contracted for by us at General Tire and Rubber Company, and that account may be serviced any place.

"Q. And in connection with the servicing of that account by one of your company stores, what functions—



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what part does the company store, that is, at the retail level—play in the servicing of this account?

“A. He is supposed to, of course, first identify the account as a national account, and then he is supposed to service that guy in any way necessary, and if it is 830 to put tires on the vehicle, he is to withdraw tires from his warehouse and put these tires on that account.

“Q. Yes?

“A. And he is not to bill him.

“Q. Could you tell us how the billing is done?

“A. The billing is done in the home office and we reimburse that store for the handling that might have been involved. It could be the mounting of the tires, it could be the balancing, or it could be in that area. We will reimburse him on that basis.

“Q. Yes. When you say reimburse, could I perhaps construe that to mean compensate him for some service?

“A. Yes, and also I forgot to say whatever tires he pulled out of his warehouse, whether it would be one, two, or five, we replace them tires back in there.

“Q. In connection with the ones he pulled out to put on a vehicle for a national account?

“A. Right.

“Q. And I take it, then, some form is submitted by the retail store?

“A. Yes.

“Q. Which reflects this store to a national account?

831 “A. Yes.

“Q. And the retail store is then compensated for the service involved?

“A. Yes.

“Q. And as you have also indicated, the inventory is replaced?

“A. That is correct.

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"Q. Is that considered a sale by the company store?

"A. No, sir.

"Q. And you have already indicated that the soliciting of the business and the arranging for the national account agreement and also the billing is also done through the home office of the General Tire and Rubber Company?

"A. That is correct.

"Q. With respect to the same sort of transaction by one of your independent dealers, and by the same sort of transaction, I mean a national account, does the same circumstance follow?

"A. It would follow exactly the same.

"Q. And, again, your independent dealer would submit some sort of record of the service it rendered pursuant to a national account entered into—national account agreement entered into by the home office of the General Tire and Rubber Company, and the independent dealer  
832 would likewise be compensated for the service rendered?

"A. And his tires would be replaced.

Mr. Tinch: May I interpose, Counsel? May I suggest that in this area you not lead the witness. I am anxious to have the witness put his answer in his own words, please.

Mr. Mitchell: I do my best in respect to your objection. By Mr. Mitchell:

"Q. To clarify the record, would you state again specifically with reference to the independent tire dealer of General Tire Company how it works under a national account and I recognize that it may confuse you a little, but I am asking you to restate?

"A. All right. It is exactly the same in either case whether it is a store or an independent dealer. He would service the account, which account would have to identify itself first, and if it is a case of supplying tires, he would supply whatever tires were necessary for this account and

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he then would report this transaction to us and we would replenish his inventory to him and reimburse him for the services he rendered. It is our account.

833 Then, the home office would bill the national account on whatever basis they want, or whatever area they would want to bill them.

“Q. In connection with the national account, does either the manager or salesman at one of your own company retail stores, or an independent tire dealer, have anything to do with setting the price or terms of payment by one of these national accounts?

“A. No, sir.

“Q. In respect to your independent dealers who handle and sell General Tire and Rubber Company products, will you state, please, sir, whether or not the quantity of products they sell is one factor in determining the cost of such products to them, and I am asking you if there are any adjustments based on the quantity of products purchased over a given period by these independent dealers?

“A. For price purposes?

“Q. Yes, or for any other purpose.

“A. I am not too familiar with this area as to the pricing involved there. I wouldn't be familiar enough with that to make a statement here.

“Q. Do you know whether or not for any purpose  
834 the delivery of General Tire and Rubber Company products by an independent dealer, pursuant to a national account agreement, is considered part of the sales by the independent dealer from your home office point of view?

“A. No, sir.

“Q. Do you know whether or not, if there may be some adjustment in price or some adjustment for any purpose, based on quantity, whether or not the independent dealer's deliveries are according to a national account arrangement, whether that goes into the quantity so used?

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"A. I still say in relation with a national account to me, delivery is entirely a home office deal, but all we want that guy to do is to service that account, and we reimburse him that way.

The records beyond that, replenishment of stock, then become entirely an area of ours, the home office.

"Q. But so far as you know, the statement that you just made that a national account is a home office deal would be consistently reflected in any of the records that are kept, and would be consistently reflected so far as you know?

"A. That is right.

835 "Q. Any dealings between home office and an independent dealer?

"A. That is right.

"Q. In connection with the commissions or compensation that are paid to personnel of the company-owned stores, are different commission rates paid on different kinds of sales, and by kind of sale, I mean whether or not resale or single sales?

"A. Not that I know of.

"Q. I think it is emphatic, sir, from the definitions and classifications that have already been read into the record from your Exhibit 1, but just to be specific, does General Tire and Rubber Company, or do you by reason of your experience in the industry, recognize any distinction in such sales as fleet accounts or sales to commercial users of tires as opposed or distinguished from sales to an individual user?

"A. I don't think so.

Mr. Mitchell: I believe that is all.

\* \* \* \* \*

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836

**Cross-Examination,**

By Mr. Tincher:

\* \* \* \* \*

839 "Q. Are you familiar, Mr. Zaveson, with the sales division and its organization within the General Tire Company structure?

"A. Yes, sir.

840 "Q. Would you tell us, briefly, how the sales division is set up with reference to the distribution of General Tire and Rubber Company products to the franchise dealers across the country?

"A. We have—there has just been a change, by the way. We have what we call a trade sales manager, and this trade sales manager, under him, then would have a manager in charge of passenger tires, a manager in charge of truck tires, and a manager in charge of accessory materials, and also he would have the district managers under him, the 20 districts.

In what I have said here, this area does not have to do with our retail stores. Now, besides that, there is a manager in charge of retail stores.

"Q. Yes. My questions, at least at this point, relate to the distribution system through the use of franchise dealers?

"A. Yes.

"Q. Might I ask you approximately how many franchise dealers does General Tire and Rubber Company have within the United States?

841 "A. This I don't know.

"Q. Could you give us an approximate number?

"A. Oh, gosh, that would be too wild of a guess for me to say. I am not that much interested, you see.

"Q. Could you say whether or not it would be greater than the number of company-owned stores?

"A. Yes, sir, that I would say.

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"Q. Is Steepleton General Tire Company at Memphis, Tennessee, classified as a franchise dealer by General Tire and Rubber Company?

"A. He is classified as an independent dealer which I imagine would be the same thing.

"Q. In that category, does he operate under a franchise issued by the company?

"A. I would say yes, but, again, I would want to reserve that. This is an area that I wouldn't get in. I know he is independent. To get into the details of whether he has got a signed franchise and such, this I don't know.

"Q. Who in your organization by name would be—strike that question.

Could you give the name of the present trade sales manager of General Tire and Rubber Company?

842 "A. Mr. Morgan J. Morgan.

"Q. And how long has he had that position?

"A. Effective December 1, 1961.

"Q. Was there anyone with that title or with duties similar to Mr. Morgan's duties prior to December 1, 1961?

"A. Yes.

"Q. Who was that individual?

"A. John Hants.

"Q. How long did he hold the position?

"A. Oh, a couple of years.

"Q. Is there a district manager in your organization who would be immediately responsible for the activities of Steepleton General Tire Company at Memphis?

"A. I would say yes.

"Q. Do you know who that district manager is?

"A. That would be Mr. Brunskill.

"Q. How would you spell that name?

"A. B-r-u-n-s-k-i-l-l, I think, I forgot his first name.

"Q. Where is Mr. Brunskill stationed?

"A. At the Memphis office.

*Testimony of Milan Zaveson*

“Q. Does General Tire have, in addition to its warehouse at Memphis, a district office there?

843 “A. Yes, sir.

“Q. How big a territory does that district office take care of?

“A. I wouldn't—I wouldn't be positive, but it stretches down into Mississippi, I am pretty sure, maybe part of Louisiana, and Tennessee. I am not too sure of the area of coverage.

“Q. I see. Could you tell me how many district offices comparable to that one the company has in the United States?

“A. Twenty.

“Q. Now, you have classified Steepleton General Tire Company at Memphis as an independent dealer. Do you have any other classes of dealers besides the so-called independent dealers and the company-owned stores?

“A. Well, you could have a subdealer.

“Q. I notice in Exhibit No. 1 to your deposition, as General Exhibit 2 in that exhibit, billing instructions, this paragraph. ‘All subdealers on which this commission is claimed must be registered with Akron, and no commission is to be allowed on any sales to accounts which is not registered on this deal without specific permission from Akron.’

844 What does the registration of a subdealer consist of, Mr. Zaveson?

“A. Just going on record with Akron that he would be a subdealer.

“Q. Who puts him on record?

“A. The dealer himself would put him on record, the prime dealer.

“Q. He would simply report to the home office that I now have a subdealer and give his name and address?

“A. Yes.

*Testimony of Milan Zaveson*

“Q. Does General Tire ever question the listing of some customer of a dealer as being a proper subdealer?

“A. Gosh, that is hard to say. I imagine that it would happen, but I wouldn't know. This would be an area that I wouldn't see, basically.

“Q. Do you know whether the company sets up any criteria with respect to who might qualify as a subdealer?

“A. That I don't know.

“Q. In your Accounting Department and as general auditor, would you be aware of any criteria by which an account could properly be considered as a subdealer account?

“A. I don't follow you.

“Q. Well, would you—

845 “A. You are talking about the retail level, now, or are you talking—you see, this always confuses me.

“Q. I am speaking only with reference to who might qualify as a subdealer, specifically with reference to Mr. Steepleton in the Steepleton General Tire Company at Memphis.

For example, would General Tire Company insist that any subdealer be a person or firm who would be engaged in reselling tires and tubes?

“A. This I don't know.

“Q. Mr. Zaveson, does General Tire Company have any independent dealers who are engaged exclusively in wholesale distribution of tires?

“A. Not that I know of.

“Q. Does it have any dealers who would sell more than 25 per cent of their total volume at wholesale?

“A. That, again, I wouldn't know.

“Q. Well, from your knowledge of the business, would you assume that some of them do make more than 25 per cent of their sales to subdealers for resale purposes?

“A. In our own area, I would say no. The fact is, in



*Testimony of Milan Zaveson*

our area, I don't see any wholesale—we don't have  
846 a wholesale classification.

“Q. What do you mean in your area?

“A. I mean our stores, the stuff that I check, that I am well aware of.

“Q. Company-owned stores?

“A. Yes.

“Q. Now, do you know whether there are any company-owned stores who would make sales to dealers and sub-dealers or any other persons for resale in quantities which would amount to 25 per cent of their gross volume of sales?

“A. This I wouldn't know.

“Q. Well, you check their returns, do you not?

“A. Yes.

Mr. Mitchell: I don't believe the witness understood the question.

May I interpolate?

Mr. Tincher: Yes.

Mr. Mitchell: The question had to do with the company stores and the volume of business by the company stores for resale, is that correct?

Mr. Tincher: Yes.

847 Mr. Mitchell: I believe this term “wholesale” which in the tire industry is a many-sided thing, may have confused the witness from an earlier question and I want to make sure the record is straight on it.

Do you get the context now of the question.

The Witness: No.

By Mr. Tincher:

“Q. Well, I will try to lay the foundation for it. I take it from your earlier testimony that company-owned stores do supply tires to various dealers for resale, is that correct?

“A. No. The Company stores do not supply dealers.

*Testimony of Milan Zaveson*

The company stores are our retail outlets that are selling tires.

“Q. Do the company stores supply any subdealers tires for resale purposes?

“A. Yes, yes, this could be.

“Q. All right, sir. Now, from your knowledge of the reports submitted by various company stores to your home office, do any of those company stores supply subdealers in quantities which would exceed 25 per cent of their gross volume?

848 “A. Now, this percentage would be hard for me to know. I would say that there would be various degrees of percentages, but to establish in my mind—to establish a percentage, this would be hard for me to do. I couldn't without an analysis of some kind, be able to do this.

“Q. And—

“A. There is no distinction in any records that we are checking here on that basis, you see. The area of sub-dealer delivery sometimes has got to do much with pricing and developing new business in relation to a retail outlet, in my viewpoint.

“Q. In your work as general auditor, do you have any concern with retail sales tax payments by the company stores?

“A. Only to the degree that when we make an audit of a place and we check their sales invoices, we would determine that in some of our test checking that the tax charged is correct.

“Q. You are aware that certain sales by your company stores do require collection of state sales taxes?

“A. Yes.

“Q. And others do not?

849 “A. Yes.

“Q. Do you check at any time to see whether the

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companies are collecting and remitting sales tax correctly with reference to the sales that they are making?

“A. We would do it on this basis: They may have an accrual account, sales tax accrual account, and we would establish that that is correct. In our sales analyses, there are areas that we look to that are more important, possibly, than that area. We haven’t—in the tax area, we don’t get into this very strongly at all.

\* \* \* \* \*

851 “Q. Now to clarify your testimony further with reference to the company stores, Mr. Zaveson, I believe you have stated that to your knowledge company stores do make sales to subdealers of tires and other supplies for resale purposes. You are not in a position to say whether any of those stores would make sales in quantities of 25 per cent or more for resale purposes.

852 Now, would it be true that whether or not such company stores or some of them sell 25 per cent or more of their products for resale, you still classify those stores as retail stores?

“A. Yes, sir.

“Q. Would you state what you consider in the tire industry to be a wholesale sale?

“A. I would say a wholesale is a sale, for instance, from our standpoint, a sale made to dealers who then would resell, and sales to manufacturers, original equipment people. This, to me, would be the basic wholesaler.

“Q. Are there any other sales made either by General Tire and Rubber Company or by company stores which you would classify as wholesale sales?

“A. Company stores, I would say we don’t have wholesale sales.

“Q. You have stated, haven’t you, that your company stores do make sales of tires to subdealers for resale purposes?

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“A. Yes, but I don’t—we don’t classify it in here in this area. It is a matter of pricing and recovering price through this commission.

853 “Q. And when you say you don’t classify it here, you are referring to your accounting forms and your accounting procedures, are you not?

“A. Yes.

“Q. Then, with reference to the company-owned stores and the independent dealers, is it true that General Tire Company does not consider any sales made by such outlets as wholesale sales?

“A. That is what I would say, yes.

“Q. For accounting purposes?

“A. That is right.

“Q. Now, as an accountant and general auditor, Mr. Zaveson, wouldn’t you consider that a substantial portion of the sales made both by your company-owned stores and your independent dealers are, in fact, wholesale sales?

Mr. Mitchell: We object to the repetition of what appears to be the same question.

Mr. Tincher: It is not the same question, Mr. Mitchell.

Mr. Mitchell: To the extent that there is a distinction which I fail to realize, I submit the witness may  
854 have failed to recognize such a distinction and for my purposes, if not for his, would you state how the last question is distinguished from the one asked previously.

Mr. Tincher: The witness has not raised such a question. Let’s have the reporter read the question back and let the witness decide.

Mr. Mitchell: I will agree to that.

The Witness: I said no.

By Mr. Tincher:

“Q. Your answer is no?

*Testimony of Milan Zaveson*

“A. That our company stores and our retail stores—their sales are not wholesale sales.

“Q. Is that true also of your independent dealers?

“A. To the best of my knowledge.

“Q. Then, would you say that in your opinion as an auditor and as an accountant and as a merchandiser of tires, a sale by an independent dealer within your organization to a subdealer for resale purposes is not a whole-sale sale?

Mr. Mitchell: I would raise the same objection, that that restates the question previously answered twice. At least, it so seems to me and I believe the record 855 shows what this witness believes to be the case, as the general auditor of General Tire and Rubber Company, and by reason of his own experience and knowledge in that capacity.

Go ahead and answer the question, sir, but I dislike to prolong this.

The Witness: You see, I am confused from this standpoint as to the amount of subdealers. To me, you are talking like we got a lot of subdealers, and this I don't see, you see. This area I don't see. I don't see that we have a lot of subdealers, especially in our—I know in our case—in case of our company-controlled stores, we do not have a lot of subdealers because our development is on the basis of the branches of which I spoke that we have in Cleveland and not on a subdealer basis.

By Mr. Tincher:

“Q. Also a branch at Memphis, is that the same category?

“A. No, no, I am talking about our retail store. Now, in itself, it can have other retail outlets in the Cleveland area. You have a Cleveland store that has five other retail outlets. This is for distribution, developing a distribution. Now, this is all retail.

*Testimony of Milan Zaveson*

856 Now, we are not developing subdealers throughout there, we are developing this type of distribution.

"Q. Branch stores?

"A. Yes, retail.

"Q. That might be the basis, then, for your misunderstanding of the question.

Are you aware that in your organization in some cities, at least, company-owned stores will supply tires for resale purposes to subdealers such as small service stations or small independent grocers who will sell tires and also have a filling station?

"A. This area I could be aware of to a degree. Again, our program in the area you are talking about, and I am talking about our program that I know of, is not in the area of the retail store. When you are talking about the gas station, this is another area where we are talking about selling to oil companies and getting that oil company account, and not on the basis of what you are saying.

"Q. Do you know whether or not the stipulation I outlined exists in your organization?

"A. It could exist, but I also know that is not a profitable deal and it is not a volume of business, nohow.

857 I know in the sales programs that I know of, and I am not an expert on sales by any means, but that I know of in our areas, I know this is not a development program at all.

"Q. By that, you mean it is not extensive and not encouraged by the company?

"A. On the basis that I know our program, the oil companies are on an oil company basis for a large amount of oil stations, and when you talk about our store here right in Akron going down to the corner gas station and doing business with him, I don't think we even go after it. It is not profitable on that basis. It can't be. Therefore, that program, I know, wouldn't work.

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I say, I am not a sales expert, but I do know areas that might be profitable and might not, and these areas are not profitable.

It is very poor distribution, if I might say so, only on a—but on a level of a group of gas stations, this is something else, and this is home office business that we would be after.

“Q. Could you give us a general listing of the products of General Tire and Rubber Company which are supplied to various independent dealers, such as Steepleton  
858 General Tire Company, at Memphis?

“A. Yes, sir. I would say the categories of supply are tires, tubes, repair materials. This is the basic supply.

Now, when we have gotten into the business of gas stations, which I referred to previously, we carry a supply of inventory on the basis of supplying large groups. Some of that material is available to our stores and so forth, but basically, this is what you call a TBA program, tires, batteries, and accessories. We do carry this line, but our basis is to supply Sun Oil Company, or some such thing as this.

“Q. I see.

“A. Our supplies are tires, tubes, and battery materials, repair materials. This is basic.

“Q. Repair accessories would include camel back and retreading supplies?

“A. Yes, and patches.

“Q. Pardon?

“A. Patches, belts.

“Q. Are you aware that Steepleton General Tire Company at Memphis makes some sales of tires and tubes for resale purposes?

“A. I couldn't say that I am aware, no, sir.

859 “Q. Would you assume that that is true from your knowledge of the type of operation he has?

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"A. I am not familiar with his operation.

"Q. Do you know whether General Tire Company has any other independent dealer located in Memphis?

"A. No, I don't.

"Q. Does the company have a company-owned store in Memphis?

"A. No, sir.

"Q. Where would be the closest company-owned store to Memphis?

"A. I don't know which is closer, Nashville or Chattanooga. We have stores in either of them places, or it could be—I would have to take a map, it could be Atlanta, Georgia; I don't know the proximity.

"Q. Do you have any in Arkansas or Mississippi?

"A. We have in Jackson, Mississippi, a store. I am guessing that that is still a store in Jackson.

"Q. Does General Tire and Rubber Company distribute at wholesale tires, tubes, and repair materials from its Memphis warehouse to individuals or to—I mean individually operated businesses or small accounts in the Memphis area?

860 "A. I wouldn't be familiar with it unless there was—if there is some equipment manufacturers there I think of a boat trailer outfit or some such thing like that, then I would say yes they could, but I am not that familiar with the local level of the Memphis branch. You see, if you get into a branch area from my standpoint, we would be concerned with taking inventory in that, that would be our big area.

"Q. Does General Tire and Rubber Company have salesmen working out of the district office in Memphis, going out to make sales to various accounts?

"A. I don't think that—they don't classify them as salesmen. They classify these fellows as territory managers.



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"Q. What activities does the territory manager have in reference to making sales?

"A. Well, he would—he is primarily interested in distribution, increasing distribution through the established distributors that we have, whether it would be company-owned or otherwise, and also getting new business.

"Q. Now, does he go out or does he have some salesman or representative in his office who goes out to work with a dealer in trying to build up sales or to sign up new accounts?

861 "A. Now, then you say does he go out, you are talking two different things here. You have got a district manager.

"Q. Yes.

"A. Under him you have the territory managers, each has a territory. These territory managers go out to develop business, yes.

"Q. Do you know who would be the territory manager for Memphis and particularly for the Steepleton General Tire Company?

"A. No, sir, I would not.

"Q. Does the territory manager actually in some cases go with the dealer to contact a potential account and try to work out terms?

"A. I would think so, but this is not my category. These duties I wouldn't be in a position to give you a very good answer.

"Q. Does General Tire and Rubber Company set up anything in the nature of quotas for its sales organization to meet or to work toward in the matter of sales?

"A. You are talking now of this territory man that we are talking about?

"Q. Yes.

862 "A. Yes, they do.

*Testimony of Milan Zaveson*

"Q. That would be based on an attempt to get a certain percentage of the market with reference to sales?

"A. It is based on a number of sales, and it is based on the policy which you would have to read. It is based on the type of sale, premium tire, regular tires. It is on a classification of passenger and truck tires. This is the way the quota is set up.

"Q. Is that quota, though, related to the number of registered vehicles, for example, in an area?

"A. No, I am fairly certain that that isn't so.

"Q. Could you give us a general idea of what percentage of General's sales are made through independent dealers as distinguished from the company-owned stores?

"A. I couldn't.

"Q. What division or branch of the General Tire organization, Mr. Zaveson, has responsibility for making these national fleet account sales?

"A. That, at the present time, comes under the truck tire managers, a subdivision of it.

"Q. Are there any national fleet account sales of equipment used in the contracting industry rather  
863 than truck transportation industry?

"A. That I wouldn't know.

"Q. Does the company publish a list of its national fleet accounts, which list is distributed to its various independent dealers?

"A. I think that they do. That, again, would come under the truck tire sales department.

"Q. Now, with reference to the national fleet accounts, is the independent dealer expected to provide for the customer whatever tires and services that go with the account in his particular area as the customer orders the product?

"A. Yes, sir.

"Q. And is it true that generally there is some service

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involved other than the delivery of the tire and tube or the product?

“A. Yes, sir.

“Q. What would that service include?

“A. I would say that it can be mounting and balancing if it is tires that they want, that they would mount and balance them.

864 “Q. All right. Would it include accepting used tires as a trade-in, in connection with the transaction?

“A. Gee, this I don't know. I don't think so, but I would not know, on the trade-in area.

“Q. Do you know whether it could include periodic examination of the tires for defects, for unusual wear, and interchange of the tires from one wheel to another wheel?

“A. I don't think, unless it was specified, because in these—in the area of adjustment, it might be referred back in to one of our divisions, or it would be operated through our control division office. I talked about a service sales manager and an adjuster, and it would work through this area when you talk about this kind of a deal.

“Q. I see.

“A. The adjustment—he might rotate tires, I would say, he might do that.

“Q. Would it be true that the services that go along with supplying the tires and tubes from time to time might vary as between different accounts?

“A. I suppose so.

“Q. Now, how is Steepleton General Tire Company compensated for providing this service to the national fleet accounts of General Tire Company?

865 “A. Well, as I previously stated, they—if it is the case—and this is an easy example—if it is a case

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of putting four tires on a fleet account, they would withdraw tires from their inventory and mount them on this vehicle. They would report this mounting of four tires to the home office in Akron; Akron would replenish their stock of four tires and pass to them some form of credit the amount of the service that was rendered in this case to them.

“Q. How is that amount of service determined, Mr. Zaveson?

“A. This, I am not familiar with, not familiar with the details.

“Q. Certain percentage of the price of the tire, isn't it?

“A. This I don't know. I know very definitely that the tires are replaced to the local area and the billing is made out of the home office. As to the details, now, of the service, this I am not familiar with.

“Q. Does your independent dealer order his tires from General Tire Company on consignment, or does he order them and make payment for the inventory?

“A. He could be either, or he could be combination, depending on his local—his and our credit departments in connection with how good the fellow's credit is.

866 We have some people on consignment, some almost entirely consignment, and some a mixture, and some——

“Q. Do you know which category Steepleton General Tire Company falls in?

“A. I wouldn't know without checking the records.

“Q. Now, you stated that after the dealer supplies tires to the national account that his stock is replenished to the extent that he used it for that purpose.

Do you know whether General Tire makes a separate shipment of specific items that he removes from his stock to put on the equipment of your national account?

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"A. It could be specific.

"Q. At other times, it might simply be giving him credit for that number and type of tire, or the amount that he had paid?

"A. Basically, from what to my knowledge, it is a replacement of the tires.

"Q. Have you dealt specifically with that area so that you can testify specifically that that is the practice?

"A. No.

867 "Q. And you are not familiar with the basis on which your dealer is paid for the services he renders in supplying tires to your national account?

"A. That is correct.

"Q. Do you know whether your independent dealer has the option of servicing a national account in his area or not servicing it?

"A. Gee, I have heard of cases where maybe a guy didn't want to, through lack of knowledge of the national account, you see. This I have heard of, and this is on a complaint basis which I have knowledge about, but not on a specific basis, you see.

"Q. Do you know whether he expressed a desire not to service the account, he was told that it would be perfectly all right, he wouldn't be expected to service it?

"A. You are going beyond what I know. I just said that I have heard of such a thing.

"Q. Do any of your store managers ever raise that question?

"A. Gee, I don't know. I don't know.

"Q. Do you know whether the reimbursement that the company gives them for providing this service is equivalent to a similar sale and service to some fleet account which he has obtained himself?

868 "A. The fleet account is an entirely different thing.

"Q. Yes, I know it is, but it is similar, isn't it?

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A fleet account which your store manager might sell and a national account which he might service in his particular area?

"A. I don't think so.

"Q. You don't think they are similar?

"A. No.

"Q. Let's go into that a little bit. I will assume that this will be a typical operation and you correct me if I am wrong, that one of your store managers will have a fleet account whereby he supplies truck tires to a wholesaler in his area. This wholesaler operates some 15 trucks. Would that be a typical fleet account for one of your stores?

"A. Yes. Now, this guy is just a local, he has got 15 trucks, and he is selling hardware and he has got these 15 trucks.

"Q. Yes.

"A. Yes, all right.

"Q. Now, in this same area, your store manager is asked to service 15 trucks which are operated in that area by Continental Baking Company, for example. Would those trucks normally be expected to require about the same number of tires and the same amount of servicing 869 in a given period of time?

"A. Well, the difference, the difference that is running in my mind could be on a national account basis. It might be in many cases just a matter of supplying tires, where on the fleet basis, he is a customer that is a little bit different to my way of thinking, to this kind locally that operates on the other basis. The national guy, to me, he just supplies the tires basically, I would say.

"Q. Wouldn't it be correct, though, to say that if this national account, for example, is a bakery which is operating a fleet of trucks in the area to distribute its products, that it would require of your store operator, your

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store manager, essentially the same products and the same servicing that his fleet account would?

“A. No, I would say no. You see, there is a different advantage to the dealer on the fleet guy than there is on the national guy. There is no advantage to him on this national guy because this is a home office deal.

On the local guy, the fleet guy, there is an advantage to him, a distinct advantage to him.

“Q. Aside from the profit he makes from the transaction?

“A. I think so, yes, because he is dealing right 870 direct with that guy. That is his guy. That national guy is not his. It is a home office deal. There is a lot of difference there.

“Q. Isn't the home office interested, though, in seeing that the national account gets satisfactory service at the local level?

“A. I would say so, but maybe on a little bit different basis again. It would refer to much the same way as a gas station operator peddling tires against a dealer peddling tires. That gas station operator is peddling gas, and he might peddle a tire here occasionally, but he has got a profit there, sure, but I think there is a lot of difference between handling a fleet operator. Again, I am not a salesman, but I can certainly see these area and say there is a real difference to me, and I am not quoting from the standpoint of being sales, but I only can see that, being familiar with the tire business.

“Q. Does your tire dealer know the price at which the tires are being sold to the national accounts?

“A. No, sir.

“Q. Would General Tire Company tell him if he asked?

871 “A. I am not in a position to know whether they would or not. I kind of doubt it.

“Q. Are those sales by General Tire Company to

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the national fleet accounts considered by you and your company as retail sales?

"A. No.

"Q. They are considered as wholesale sales?

"A. I would say, and I would have to—I am trying to think in my mind, the billing in Akron as to our sales classification on our books that the sales are reported on our books and we are a wholesaler. That is why I say no. It is a sale recorded on our books, so therefore I would say it would be a wholesale sale.

"Q. And do you know whether retail sales tax is paid by the national fleet account purchaser on such tires when they are delivered and placed on his vehicles in a state where retail sales tax is levied?

"A. I would say that the sales tax is properly handled, and the reason I say it is properly handled is because our billing department in Akron is aware of the taxations in all states, through the fact that we have a Taxation Department that keeps them current. Therefore, they would know how to handle this.

872 "Q. You don't know how it is handled?

"A. No, this is a detail. I only know from a control standpoint. My job as an auditor in the home office is to see that there are certain areas of control. We know this control exists in the Billing Department.

"Q. Can you state whether or not General Tire Company makes any sales of tires through its sales division which are considered as retail sales?

"A. I would say no.

"Q. Does General Tire Company, through its sales division, make any sales of recapped tires?

"A. Let's qualify one thing here. When we say General Tire Sales Division, we are talking about now the home office as the manufacturing unit and not as part of the store here?



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"Q. That is correct, yes.

"A. All right, then, I say no, there is no retail.

"Q. Yes. I am referring to any sales which General Tire Company might make, if it does make such sales, other than through dealers and its own stores?

"A. That is wholesale.

873 "Q. Does General Tire Company make any sales of recapped tires on a national fleet account basis, or otherwise than through its own company stores or its dealers?

"A. No.

"Q. Are any sales of recapped tires made through national fleet accounts, by the company?

"A. I wouldn't be aware if they are.

"Q. So far as you know, all the national fleet account sales are of new products?

"A. No, I wouldn't know either way is what I am trying to tell you.

"Q. All right.

"A. You see, I might say this: From the standpoint of our cap shops that we have located there, that you have there, we haven't been in the business of producing a lot of capped tires to wholesalers.

Now, lately we have increased a little bit there on the basis of keeping them shops busy when they are not busy working on customer dealer capping.

"Q. And are your recapping shops now supplying recapped tires to independent dealers as well as to some of the company stores?

874 "A. Yes.

"Q. Now, you said that General Tire doesn't treat this transaction whereby Steepleton Tire Company at Memphis supplies tires to a national account as a sale. Is that correct?

"A. No.

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“Q. Is it not?

“A. General Tire, as a manufacturer, that is a sale that we made.

“Q. You have made a sale?

“A. To a fleet account.

“Q. And the transaction——

Mr. Mitchell: Correction. Did you mean to say a national account?

The Witness: Yes, national account.

Mr. Mitchell: We have used the term here and I don't want to have the record confused.

By Mr. Tinchler:

“Q. When is that sale completed, Mr. Zaveson?

“A. That sale is completed at such time as the report is made by the store or dealer to our home office, and they produce the proper papers to make the billing and replenish stock.

875 “Q. Wouldn't it be more correct to say that the sale is completed when the dealer delivers the tire, mounts it on the customer's truck?

“A. Well, this I don't know. I am talking about a piece of paper, now, that has dollars on it going to the customer and that comes out of our Billing Department, you see.

“Q. That is the billing?

“A. Yes.

“Q. For the product that was sold and delivered, isn't it?

“A. Yes.

“Q. But from your knowledge as an auditor, wouldn't you consider that the sale was completed, pursuant to this prior arrangement between General Tire and the customer

—  
“A. Depends on the terms.

“Q. —the sale completed when the product is delivered to the customer?

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“A. It all depends on terms. You see, I think right away in my mind, we buy something and this comes up every year. Now, the terms are the sale, the terms involved depends on whether that is our possession or their possession, isn't it, or whether it is FOB shipping point, or FOB delivery point. This is what is running through my mind. In some cases, as soon as that guy ships, it is ours. Sometimes it is not ours until it is in our location, you see. I don't know the terms here and I couldn't tell you, you see. I imagine this is the way you are asking me.

“Q. Yes, I am trying to get information.

Would it be correct to say that the typical national fleet account sale would be an arrangement—correction, strike that question.

Would it be correct to say that the typical national fleet account arrangement between your company and the customer would be an understanding that your company would supply that accounts needs in the various areas where it operates as those needs arise?

“A. I have never read the contracts involved, and therefore I would not be in a position to answer that on that basis.

“Q. Well, from your general knowledge of how it operates?

“A. My knowledge of operation is on the basis of what I have said, you see, of the replacement of the inventory, and the fact that the sale is not recorded here because, again, in my audit work, we are very watchful of the fact that there is no sales recorded here, that they are home office sales. This is the area. When you get into the finer details of this thing, I am not familiar with it enough to give you an answer beyond what I am giving you.

“Q. Do you know enough about the way the national

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accounts are handled to know that the customer does not agree to take a specific quantity of tires and tubes in any given period of time?

"A. I would assume that that might be so.

"Q. And that he really is arranging with the company for his needs, whatever they may be, to be supplied from time to time as the needs arise?

"A. It could be, but you see, there again, it is like anything else. When you are dealing with five guys here that I may deal with you in one manner and with him in another manner.

"Q. Yes.

"A. That kind of thing.

"Q. Do you know that in general the prices that are paid by your national fleet accounts per unit are less than the prices which your independent dealer is authorized to sell to his fleet accounts?

"A. I am not familiar with the price structure on 878 that basis.

"Q. Does General Tire publish manufacturers' suggested prices for its dealers?

"A. I am not familiar with that. You are talking about the company store?

"Q. Yes.

"A. He has a price list. This, very definitely I could say, he has a price list. The independent, that is another story.

"Q. Well, don't you know that the independent dealer has suggested price lists which are either the same or comparable to the price list furnished to your company stores?

"A. No, I couldn't say truthfully on a detail basis in that area.

"Q. Does General Tire Company, then, control the prices at which its store managers sell tires and tubes?

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“A. No.

“Q. What would be the purpose, then, of the tire price lists which the company furnishes to its company-owned stores?

“A. The price of his inventory, for one thing, and he might—it is a basis for his sale of a certain markup of profit. He has got to know his cost. He has got to  
879 have a base for the whole thing.

“Q. Yes. Then you would say the price list which the company furnishes to the company store are primarily for his use in knowing his costs?

“A. That is correct.

“Q. And he is at liberty to make his sales at prices of his own choosing?

“A. I would say in categories, I would say in the passenger line, basically, they have prices that are pretty well established. I would say in other areas, he has a leeway to work, especially in the premium line.

“A. All right, and my questions will refer to your company-owned stores' sales of tires and tubes?

“A. Yes.

“Q. Is the manager required to show on such sales, or to earn a specified profit?

“A. Well, he works—he works basically on an overall profit on here. This is the thing that we push at him pretty strongly, or the manager of the retail stores. If the picture here does not show a profit, then they go into the categories of where he is maybe not getting the right profit.

880 “Q. And you are referring to Exhibit No. 5 to your deposition?

“A. Oh, yes, 5.

“Q. So within limits of home office auditing of his profit and loss statement, he is free to set prices of tires and tubes at whatever level he chooses?

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"A. Well, I would say yes, but not to the degree that you might get some hogwild guy, you see, that—boom—this Exhibit 5-a goes red altogether. We would get in there pretty fast and see what is wrong, or a territory manager might come in there and say, 'I think you are selling too low.'

Of course, you have advertising media that indicates certain prices on certain stuff, but there is a leeway there, yes.

"Q. Mr. Zaveson, are you aware that in some instances your store managers and independent dealers of General Tire Company will get approval from some General Tire Company representative for the sale of tires to a particular customer at a price which is less than the company charges ~~that~~ dealer or manager?

881 Mr. Mitchell: I hate to interrupt, but may we have the first part of that read back? I don't recall whether it related to the store run by the company and the independent dealer or not.

(Record read as requested.)

The Witness: I think if I understand it right, yes, this could happen; but not just from our representative. This would have to be from a specific individual, I would say, on a district level or management level of the home office. By Mr. Tincher:

"Q. All right. When that is done, does the General Tire Company make a special adjustment for this dealer in order that he can carry through the transaction which has been approved and make a profit on the deal?

"A. What do you mean by special adjustment?

"Q. Lower his price, so that he, for that particular customer, will be paying less for the tires than he gets when—

"A. On a specific billing?

"Q. Yes.

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“A. This could happen.

882 “Q. And does happen?

“A. Yes.

“Q. Is that, also, considered by you as a retail sale?

“A. Yes.

“Q. Even though—

“A. Wait a minute, hold it.

“Q. Explain your answer, I am sorry.

“A. I don't want to get confused here.

I assumed that you were talking on a wholesale level in what you were directing at me, so now you switch to retail and I am a little confused. When you talked of a special price, I was talking of a wholesale basis.

“Q. Yes, a special price to this particular dealer?

“A. Then you reverted to retail.

“Q. All right, now, I didn't call it retail. I am asking you whether you call it retail when the price to that particular customer, as approved by home office personnel, is less than this dealer's usual price?

“A. Well, it is still a retail sale.

“Q. In your opinion?

“A. Yes.

883 “Q. Do you know in that instance whether the dealer bills the customer or whether General Tire Company bills the customer?

“A. In the instance we are talking about, the dealer would bill the customer.

“Q. Suppose that customer is supplied out of the dealer's inventory, for which the dealer has paid a price greater than the customer's price, how would General Tire Company make the adjustment which would enable the dealer to profit from that transaction?

“A. Well, that is made on a claim basis, I would say, and that claim could come two ways. It could come as

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a direct claim by the dealer, or on a form produced by the district manager.

"Q. Would such an adjustment be shown on the profit and loss balance sheet anywhere in this Exhibit No. 5 to your deposition?

"A. If he claimed it, he would use this spot right here, and I am talking about our retail store, if there is a claim.

"Q. Yes, sir. You designate that as Item 1204 under current liabilities?

884 "A. Yes, but let's say this is a specific item that could be in this claim.

"Q. Do you get in your department balance sheets and profit and loss statements from any of the company's independent dealers which are prepared on the same form that you have made here Exhibit 5 to your deposition?

"A. Not in my department.

"Q. What department would those profit and loss statements and balance sheets from independent dealers be filed?

"A. If they came in, if they came in in that form or maybe another form, they would basically go to the Credit Department.

"Q. Do you know whether some of the independent dealers do submit such balance sheets to the Credit Department of the Tire company?

"A. I would say yes, through their normal course of keeping track of the limitations of credit extended. This is a normal requirement in many cases.

"Q. Would you assume from your knowledge of the business that Steepleton General Tire Company would submit periodically such balance sheets?

"A. I would have no idea.

885 "Q. You wouldn't be in a position to assume one way or the other?



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“A. No, I wouldn’t be interested, in my area.

(Discussion off the record.)

By Mr. Tincher:

“Q. Are you familiar with the fact, Mr. Zaveson, that in various states a state price list is used in making sales to the state government and perhaps to county and city governments?

“A. I am familiar with the fact that there is possibly, yes, but I don’t know whether that is on a local level or the level of the home office. This I am not sure.

“Q. But you are aware that in particular areas, such a price list is used by tire dealers in selling General tires?

“A. Well, I would have to revert back to stores.

“Q. Yes?

“A. And say that there could be, on a company-controlled store basis.

“Q. From your knowledge of that fact, can you state whether or not the price at which General Tire products are sold to the state and county and city governments is a price comparable to the price to subdealers?

886 “A. This I wouldn’t know.

You see, when you get in the area of some of this pricing, we verify prices inventory-wise in our stores. When it gets to the point of sale and prices in relation to sales, sometimes we might not be interested unless they specifically say this price is lower and maybe you get into that area.

“Q. In other words, throughout your accounting procedures, you are not considering the prices at which any particular dealer or store manager is selling the product?

“A. To me, it is an auditor, you see. Accounting, it is something else, but me, auditor, not unless I am specifically requested to get into these areas.

“Q. Mr. Zaveson, would General Tire Company at its home office have records that would show all products

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delivered by it to Steepleton Tire Company, for example, in 1960?

"A. Yes, sir.

"Q. And would it also have records showing all the products delivered by Steepleton Tire Company to national fleet accounts?

"A. It should, yes. I don't know how they file that stuff, but I am certain that this file would be on hand.

"Q. And those records would show, I presume, the items, quantities, dates, prices, and so forth?

887 "A. Yes.

"Q. Has General Tire Company made any study with reference to the margin between prices paid and prices charged by its dealers which will enable such dealers to make a profit in their business?

"A. I would assume that this is just a normal program that our Sales Department would have right along.

"Q. Now, would you know what the figure is with reference to General's independent dealers?

"A. No, sir.

"Q. Do you know what it is with reference to the company-owned stores?

"A. No, sir.

"Q. Could you give us an approximate figure?

"A. I don't think so because, again it is not—it is of no interest in my area unless specifically I go into analysis which is very seldom. The area doesn't usually concern me.

"Q. Have you prepared such analyses in the past?

"A. I don't recall.

"Q. Or had one under your supervision prepared?

888 "A. Not on that basis. We made an analysis of our Los Angeles, California, area at one time as to what was causing a lack of gross profit. I don't know just how that was broken down at the present

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time, but I am pretty certain that we didn't go down and compare cost with selling and go right across and try to establish a percentage.

"Q. Do you know whether General Tire consigns any stock to contractors in the Memphis area for their use?

"A. I wouldn't without checking records. From a memory standpoint, I could not say.

"Q. Is that done in some areas, to your knowledge?

"A. Yes. I can think of a specific one at the time that they were building a large dam up around Hungry Horse and we consigned a large number of tires in that area.

Mr. Mitchell: For the record and because some of us are not so good at geography, could the witness state where Hungry Horse is?

The Witness: Up in Oregon, around that area, around the Snake area, up in the northwest.

By Mr. Tincher:

"Q. Was that a transaction handled directly by the General Tire and Rubber Company?

"A. No, it was handled by the dealer that had the 889 account, you see. Now, when you talk about consignments, then we, of course—that would be our tires until such time as the billing went through, he sold them to that person.

"Q. In other words, it was a transaction, then, that was being handled by the dealer?

"A. Yes.

"Q. Does your company normally have one particular salesman who will call on the dealers in an area?

"A. Well, as I stated before, he is a territory man.

"Q. A territory man?

"A. Territory manager.

"Q. Manager?

"A. Yes.

"Q. And you would assume, I suppose, that at any

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particular time the same territory manager would be calling on the Steepleton Tire Company at Memphis?

"A. The same one?

"Q. Yes.

"A. As long as he is employed, I would imagine so.

"Q. Yes. Now, is he paid by General Tire Company on a commission basis?

"A. He is paid on a salary basis, and a bonus  
890 arrangement that I previously indicated to you that has a direct connection with his expenses, too.

"Q. I see.

"A. This is not a commission, it is a bonus paid at the year end.

"Q. Is that territory manager authorized to work with the dealer in setting prices to be charged to a particular fleet account?

"A. As to setting prices, I don't know this. To my knowledge, the guy is to help the dealer develop business.

"Q. General Exhibit 2 to your Exhibit 1 refers to a five per cent commission which is allowed by General Tire to, I assume, its dealers for sales to subdealers. Is such commission allowed in addition to profit which the dealer would make on the sale to the subdealer?

"A. I would say yes, but you see usually the profit is less there, and this would be compensating for some of the profit.

"Q. Profit would be less than what?

"A. Well, he might sell at a lower price to his fellow and then get the commission on his to compensate him for the different that he would get on a normal retail sale.

"Q. Does your company have any stores that would  
891 make sales, for example, to a taxicab company in the same location on a fleet account basis?

"A. Could.

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892 "Q. Assume that one of your stores sells a lot of new passenger automobile tires to a taxicab company with discounts from the list price, would you consider that to be a retail sale, Mr. Zaveson?

"A. As far as the records of the store are concerned, we discourage and don't enter into a deal of this type that you are bringing out here because when you talk about that type of a deal, we do not want our stores to enter into that type of deal.

There are a lot of ramifications to it. We are in that type of business in the home office with taxi accounts in New York, and we handle them on that basis. We discourage this type of business.

"Q. In other words, your company prefers to handle that on a national account basis?

"A. You are talking about specific cabs, yes, this is a real area. That is right.

"Q. And does your company have some taxicab companies in its national accounts?

"A. Not as a national account. We have taxicab accounts in Cleveland and we have the taxicab accounts in New York, handled by the company itself entirely, servicing and all. A dealer is not involved.

893 "Q. Do you know whether your company has any taxicab accounts in Memphis?

"A. No, sir, I do not know.

"Q. To the extent that your company makes a sale directly to the taxicab accounts, are those sales considered to be retail sales or wholesale sales?

"A. Mileage sales.

"Q. Mileage?

"A. We sell on a mileage basis, or rental basis.

"Q. All right. New tires as well as recapped tires?

"A. Well, it is new tires. We collect the recaps as often as we want to. It is nothing to them. They pay by mileage.

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"Q. In other words, the arrangement permits General Tire Company to take a tire off and recap it and put it back on the taxicab?

"A. Sure.

"Q. Do you have a special name or category for that type of business?

"A. Mileage account that we have. We call that the taxi account. The fact is on that we even have a taxi tire.

Now, I am specifically in my mind thinking of our  
894 taxi account in New York.

"Q. All right. Is it in a different category than the taxi accounts in other places?

"A. It is the only one I am familiar with.

"Q. In New York, is there a retail sales tax on items such as tires and tubes?

"A. No, again, I would say what I said before in relation to tax. This emanates from our tax division and our Billing Department. I wouldn't be familiar with it one way or another.

"Q. Is there any breakdown in your accounting practices with reference to the taxi accounts which would place them either in the category of retail sales, or wholesale sales?

"A. There again they are sales right out of the home office. Now, we have what we call a Mileage Department, a separate division within the company that creates mileage sales which are bus—would be bus on a mileage basis and taxis on a mileage basis, so therefore you have a category at the home office which I would say is a wholesale sale classified as mileage.

"Q. All right. Does General Tire Company itself make any sales to used car dealers?

"A. Manufacturing? You are talking about the manufacturing plant?

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895 "Q. Yes.

"A. No.

"Q. Are there any other categories of sales, then, other than the sales to manufacturers of automobiles, sales to national accounts, sales to taxi accounts, and bus companies on a mileage basis, in other classifications of sales that are made direct from the General Tire Company?

"A. Sales to your dealers. You can get into a lot of classifications now when you are talking about sales. We could have sales on a basis of brands, private brands. We could have sales on a bulk basis.

"Q. Yes.

"A. But basically, the sales as you have indicated, there would be large categories.

"Q. On Exhibit No. 3 to your deposition, Mr. Zaveson, in the lower right hand portion of the page, there are certain letters, R. T. OC. NC., and so forth. Would you explain what each of those symbols are?

"A. I might not know all the symbols, but the reason for this is to classify how the customer came in, whether from a radio ad, TV, whether he is an old customer, whether he is a new customer, you see. It might be a newspaper ad. I don't know what the rest of this is,  
896 but this is the reason for this.

Mr. Mitchell: May I interpolate? May the record show when the witness said "radio", I indicated the letter "R" and television, he pointed to "TV" and old customer, and so forth, so that we can have the answer responsive to the question.

By Mr. Tinch:

"Q. On Exhibit 4 to your deposition, Mr. Zaveson, there is a column numbered 645. Would you explain what the abbreviated words mean and how that column is used in your accounting procedures?

"A. Yes, that is a reserve for retreated business,

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and in the capping business, you inspect the casing, and you assume that that casing is good and you cap that tire. You have a certain amount of risk involved in the capping of that tire, so we, in order to replace a tire if something goes wrong with it, we set up a certain amount of reserve ahead of time anticipating X amount of the tires might go bad.

If the experience shows low, we adjust off. If the experience shows greater, we adjust up. At the end of 897 the year, we wash off. That must be washed off.

I am talking about in relation to our retail store. That must be washed off at the end of the year and we start over on a new year.

“Q. Where on the accounting forms that you have made a part of your deposition would an independent dealer show the income from servicing of the company’s national accounts?

“A. I don’t know whether the independent would show.

“Q. Where would your company store manager show it?

“A. He would show it on the Exhibit 5-c, the category ‘Other Income’ at the bottom, under ‘Commissions Earned.’ All the way at the bottom.

Mr. Mitchell: Again for identification in the record, might I suggest that the witness mark on the copy, and we will duplicate the item or entry to which he refers?

The Witness: In the category ‘Other Income’ and the account number, and there is a number 8004, to identify it.

Mr. Mitchell: Will you just circle that please?

The Witness: Yes.

898 Mr. Tincher: All right.

By Mr. Tincher:

“Q. Are there any other items that the store manager could include in the same category?

“A. He could.



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"Q. Would you give us some samples of what they might be?

"A. My thinking isn't that good as to just what it might be offhand, but there could be other areas of commission that he could have in here. This area is not a great—there isn't a great amount of activity in there on the national account basis.

"Q. Are there any other billing points used by General Tire Company, other than its home office at Akron?

"A. Just started some other billing points. At one time we had a great many billing points. We centralized. Now we are in the process of decentralizing.

"Q. Has a separate billing point yet been established for Memphis?

"A. No, sir.

Mr. Tinker: That is all the questions I have Mr. Zaveson.

899

**Redirect Examination,**

By Mr. Mitchell:

"Q. All right, sir. I would like as expeditiously as I can to clear up the distinctions that there may be between fleet account sales by a company store or an independent dealer and the delivery function or mounting functions of an independent store on a company account arrangement. Am I correct in thinking that a fleet account sale would be one made by the store manager or store personnel to a local purchaser?

"A. Yes.

"Q. And in that transaction, would the store manager or store salesman enter into the price and terms of sale with the purchaser?

"A. Yes, sir.

"Q. In connection with fleet account sales, is the billing

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done and the collection from the purchaser both done at the local level, that is, the company store?

"A. Yes, sir.

"Q. In connection with sales to fleet accounts, does the store earn and report whatever its markup or profit may be based upon the difference between its cost and the price at which it sells the product to the fleet account?

900 "A. Report to who?

"Q. Well, on these accounting papers?

"A. Yes, it does, yes. In a normal transaction.

"Q. With a fleet account purchaser?

"A. Yes.

"Q. And if after the transaction some adjustment need be made by reason of a performance of the product, or whatever, would that arrangement in a fleet account sale be handled by the store manager or some personnel in the company store?

"A. Right.

"Q. With the purchaser directly?

"A. By that store. It is their account.

"Q. Now, then, if I may, sir, if I understand your testimony and these transactions directly, we may contrast that with the national account transaction on each of those things, and I would simply like to check it out, the terms of sale and the arrangements with regard to the national accounts are entered into at the home office level?

"A. That is correct.

"Q. The prices, the billing arrangement, the terms of sale those are all entered into by home office personnel?

"A. That is correct.

901 "Q. The billing is likewise done by the home office?

"A. Yes.

"Q. On a national account transaction?

"A. Yes.

"Q. With respect to deliveries at or by a company store

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under a national account transaction, there is a replacement of inventory to the company store?

“A. Yes, sir.

“Q. And that is—

Mr. Tinch: I wish to object to the leading form of the question.

Mr. Mitchell: I recognize that your objection is perfectly valid. I was trying to move along a little bit. If not proper, I agree; but I think this is actually a resumé of his testimony and I am doing it so that my understanding on the record will be clear.

By Mr. Mitchell: “Q. In obedience to the objection, will you state if the same replacement of inventory, which you have just said does occur in connection with the national account transaction—does that same replacement occur with other fleet account transactions?

902 “A. No, I would say so.

“Q. And would you state, please, sir, whether or not what the company store receives out of a national account transaction is a profit measured by a markup on merchandise, as was the case with the fleet account, or is it a compensation for something else?

“A. Well, my understanding is that compensation for handling the account.

“Q. And by contrast with the adjustment such as may be made on a fleet account about which you have already testified, at what level is the adjustment made in regard to a national account?

“A. That is home office again.

“Q. Now, then, in part of your testimony on cross-examination, I was confused. The record, I think, may possibly be confused although you did, later, in answer to some questions, elaborate and explain in part what I am about to ask you; I think I am correct in construing your testimony to have been that as a matter of home office

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policy, no effort is made and no emphasis is placed on sales by your company stores to subdealers. In the 903 vernacular, this is a sales area that is not pushed.

Is that correct? Did I construe your testimony correctly in that regard?

"A. I had indicated, yes, in our company stores that the area that is pushed is the area of branches of this store rather than the area of subdealer.

"Q. Yes. Now, then, you were asked several questions with regard to whether sales that were made in the company stores to subdealers for resale by those subdealers were retail sales or not?

"A. I had only indicated to me it was all retail, as classified here.

"Q. Now, my question is: In making such an answer, are you taking your information from the frame of reference of your own knowledge of what kinds of sales are actually made by the retail store?

"A. That is right.

"Q. And do I understand your testimony to be that your knowledge of the facts as they actually exist is that your retail stores do not make such subdealer sales to any extent, or to any significant volume?

Mr. Tincher: I object here because the question appears to be leading and also to be immaterial. I realize 904 that counsel is attempting to summarize the witness's testimony, but I think the form of the question is objectionable.

Mr. Mitchell: I actually agree that it was leading and for the purposes already indicated.

By Mr. Mitchell:

"Q. Will you state, sir, what is the frame of reference of your answer; that is, are we talking about what actually happens in the company stores?

"A. Well, this is what I was driving at as to what we had on the company store level.

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“Q. And based upon your knowledge of what actually is happening and is reported to you by the company stores, it is your opinion that their sales are retail, is that an accurate statement?

“A. I would say so.

“Q. Now, then, with regard to such sales as are made—strike that. I should predicate that.

Is there to a limited extent, if at all, any sales by your company stores to subdealers for resale by the subdealers?

“A. I would say yes.

905 “Q. Now, would you tell us, please, sir, if you can by reference to the exhibits to your deposition, what are the directions and what is the procedure followed with respect to the recording of such sales to subdealers as may be made?

“A. It refers right back, then, to what we said before in this original exhibit.

“Q. For the record, sir, is that what has been made Exhibit 1 to your deposition?

“A. Yes, sir.

“Q. All right.

“A. And the General Tire exhibit, General Exhibit No. 2, then we would go right back to what we had specifically previously said that we must be on record—the dealer must be on record with Akron, and that is for the—is supplied by the dealer himself and the purpose of it is to be able to obtain the difference in price or commission as indicated here from what he would be selling that guy to so that his profit would even off to be compensated much the same as it would be on any other retail sale that he makes.

“Q. Now, then, this billing instructions, which is General Exhibit No. 2, a part of Exhibit 1 to your deposition,

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indicated that certain claims are to be made in  
906 order for your company store to obtain the com-  
mission provided for by this billing instruction,  
and is that the basis on which your records distinguish  
such sale? That is, by reference to claims?

“A. Yes, sir, I would say so.

“Q. Now, then, I take it that these claim forms must  
be some additional document or writing, and by addi-  
tional, I mean something that we have not introduced  
here this morning. The claim as such appears on some  
other record?

“A. Yes.

“Q. So that your accounting records with regard to  
these sales to the extent they may be made by your com-  
pany stores to subdealers would be reflected in part as  
you have indicated and also reflected on separate claim  
forms pursuant to billing instructions, is that correct?

“A. I would say so, and again, this would refer to de-  
tails within the Billing Department that I would not be  
entirely familiar with that portion of it.

Mr. Mitchell: I believe that is all I have, sir.

**Recross-Examination,**

By Mr. Tinch:

“Q. Mr. Zaveson, this sale by your company store  
907 to a subdealer, is that supposed to be made at the  
same price the company store is able to purchase  
the product from your company?

“A. Not necessarily. He could bill that at a low profit  
and pick up the difference in his profit by the commission.  
He has got to permit this guy to make a little bit of  
profit.

“Q. Yes?

“A. And he is not going to at this point make the same  
profit. I am talking in a broad sense. This, again, would

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be much on the basis of how much margin he would get. If it is a lower ball he is getting his difference back through this area.

“Q. All right, now, again, just for a minute, with reference to the national accounts, you stated that when one of your dealers services a national account, his inventory, then, is replaced?

“A. Yes.

“Q. But if I am not mistaken, you answered that question earlier by me when I asked you the question that you are not familiar with the procedure for replacing the inventory?

“A. No, that wasn't so. I said that basically the  
908 inventory was replaced, and you asked me whether it could be in a form of a credit or a different size, and I said I wasn't familiar with that portion of it.

“Q. All right. You don't know, then, actually whether four tires of the specific size that are put on one of the national accounts is separately and distinctly replaced by General Tire Company for that dealer?

“A. I would not be able to say that here without getting into the detail of a record and seeing that record, remembering it to that degree.

“Q. Then you said if any adjustment has to be made with reference to that delivery of tires to your national account, the adjustment is made at the home office?

“A. No, I said it would be—if a tire blew out or something like that?

“Q. Yes.

“A. And therefore there would be an adjustment?

“Q. Yes.

“A. There would be at the local level of a service manager at that point, and I would say he would make that. If not, that dealer possibly could make it, but then it would be a claim back to us, it is still our account.

*Testimony of Milan Zaveson*

909 "Q. Then, if he had to replace the tire after three months' time, because of faulty tire or improper performance, he would do that and, as I understand it, the company then would arrange for the proper adjustment between itself and the national account?

"A. It is the company's account. You must understand that there would be various ways of doing it. You don't specifically say on certain things that ABC, this is what you do. I say it belongs to General Tire and Rubber Company home office. It would depend on the circumstances, the specific circumstances and what this guy and so forth, and what you would do in detail, you see. This is a tough thing for me to tell you.

"Q. And you try to make such adjustment as will keep the customer satisfied?

"A. The home office is directing this, yes.

"Q. Yes?

"A. This is the important thing to me, it is our baby.

"Q. All right now, in what way when such an adjustment is made does the company compensate the dealer for his part?

"A. Depends on what he did, depends on what he did, what performance he made.

910 "Q. Does he send a statement to General Tire Company in which he says, 'I performed a certain service on a certain day and my charge for that is two dollars'?

"A. Could be.

"Q. That is done?

"A. Could be.

"Q. Does General Tire Company accept his statement, or do they make their own evaluation and charge?

"A. Well, if there is a—again, if there is a service sales manager in the area, this would be our representation. It might be our district office made a representation. I



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would say yes, we may question the dealer as to what kind of a service he performed down there. This would just be a normal, to me, transaction.

\* \* \* \* \*

913      **DEPOSITION OF RAYMOND L. DAVIS.**

\* \* \* \* \*

915                      **“RAYMOND L. DAVIS,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

“Q. Will you state your full name, please?

“A. Raymond L. Davis.

“Q. What is your home address, sir?

“A. 111 Kenridge Road, Akron, Ohio.

“Q. What is your employment?

“A. I am Manager of retail operations for Goodyear International Corporation.

“Q. Is that a division or subsidiary of the Goodyear Tire and Rubber Company?

“A. That is.

“Q. And does the Goodyear International have its home office in Akron, Ohio, as does the parent corporation?

“A. It does.

“Q. Would you give us the address of your office, please?

“A. 1144 East Market Street, Akron, Ohio.

“Q. What is your term of service as an employee of  
916 the Goodyear Tire and Rubber Company, or one of its subsidiaries?

“A. Twenty-seven and one-half years.

“Q. And to facilitate it, since our computations some-

*Testimony of Raymond L. Davis*

times are not too accurate, will you give us the year in which that employment began?

"A. I should have said 28 and a half years; I started July 1, 1933, up until the present time.

"Q. What was your first position with that company?

"A. Originally, I started as a trainee in the branch and the store operations in Kansas City, Missouri.

"Q. Is that store operation a retail store? That is, does it sell tires and other products of the stores in Kansas City?

"A. Yes, primarily a retail operation.

"Q. How long did you continue to work at that level for the Goodyear Tire and Rubber Company?

"A. Approximately nine months.

"Q. What was your next assignment or position?

"A. I was store office manager and depot branch office manager at Abilene, Texas.

"Q. And again, is that in connection with the serving of customers in the community of the store out of which you worked?

"A. Yes, it was. That was both a retail operation and as a separate operation, a depot branch.

"Q. For how long did that employment last?

"A. I was there approximately two years and one month.

"Q. Thereafter, to what position did you advance, sir?

"A. I was then moved to the Dallas Branch Office of Goodyear as chief clerk in the district.

"Q. And what, generally, did your duties consist of and what were your areas of work in that capacity?

"A. At that time I was involved in general branch operation and also the handling of the accounting functions, the—shall I say heading up the accounting functions of our retail stores in the Dallas District area.

"Q. And for how long did that last, sir?

*Testimony of Raymond L. Davis*

"A. Approximately one year.

"Q. What was your next position or title with Goodyear Tire and Rubber Company?

"A. I was district operating manager at the Houston District of Goodyear.

"Q. Would you explain briefly what your duties in that position may have included?

918 "A. General control of the operating functions of the branch and also at that time supervision of retail stores and handling, managing the accounting for retail stores as well as for the district office.

"Q. For how long did you hold that position, sir?

"A. About a year and eight months.

"Q. Thereafter, what position did you hold?

"A. From there I was sent to Kansas City as field auditor in the Kansas City area, where I audited our own retail stores and our branch organizations, sometimes on dealer consignments, dealer work for a period of approximately five years.

"Q. And from Kansas City, where did you go?

"A. I went to Chicago from there as regional auditor for the North-Central Region which covered about seven states.

"Q. In connection with your audit duties in that position, did you continue to have some responsibility or control over your store accounting and store operations?

"A. Yes, I did. My work was auditing in both retail stores and in the district offices as well.

"Q. And for how long did you stay in the Chicago position, sir?

"A. I was there a year and three months.

919 "Q. And from there, what position did you take?

"A. From there, I came into the home office in Akron as staff auditor in charge of field auditing.

"Q. And would you state, sir, again in that position

*Testimony of Raymond L. Davis*

what responsibility or duties you had with respect to the retail store operation or accounting?

"A. At that time, it was primarily not so much retail store for that period of time, it was the working out of our general organization plan of auditing, our procedures for auditing, the field directions for auditing, and more or less the general overall supervision of the 30 field auditors in the field.

"Q. And did these directions which you were working out and planning and systems of audit that you were devising in that system have to do, at least in part, with the auditing of retail stores?

"A. Yes, it did.

"Q. And what was your next position, I take it with the Akron office?

"A. From there, I transferred into the Retail Store Operating Department as a staff man, senior staff, and was on that position for approximately four and one-half years.

920 "Q. Now, from the term or classification or retail store operating staff man, I take it in context that that refers to directly the merchandising through the retail stores in your area?

"A. It does, Mr. Mitchell. It refers entirely to the operating end, comptrollers' end at that time, of our retail store operations which included the operating instructions, the devising of procedures, the opening of new stores, the closing of stores, personnel in the Operating Department, and various types of that work.

"Q. And since it was from the home office in Akron of your employer, I take it that your responsibility extended to the whole field of domestic operation?

"A. Yes, to our entire chain of stores.

"Q. And what position did you have after that?

"A. In January of 1950, I went to the Oklahoma City

*Testimony of Raymond L. Davis*

District as store supervisor, in which position I was placed for approximately two and a half years.

“Q. And again that had directly to do with the managing and overseeing of retail stores in the area around your district?

921 “A. That is right. I supervised 12 stores in the Oklahoma City area from the standpoint of sales, operating, control.

“Q. And I take it that would have extended up to about 1952 and 1953, is that correct?

“A. Yes, about the middle of 1952.

“Q. And what position have you held since then with your company?

“A. I came back in in 1952 as assistant manager of the Retail Store Operating Department, which position I held until June 1, 1955.

“Q. And there, again, that had to do with the overall managing and control of retail stores throughout the United States for your employer?

“A. That is correct, very much the same type of work as when I was on staff work except that I was directing it more than doing the actual detail work.

“Q. After 1955, what have you done?

“A. January, 1955, I went to the Southwest Region at Dallas as regional manager which was a different category than our previous work which was operating entirely, and this was operations meaning control and merchandising functions in the stores.

922 “Q. And for how long did that position continue?

“A. I was there approximately two years.

“Q. Which brings us up to about 1957?

“A. Right.

“Q. Since 1957, what have you done, Mr. Davis?

“A. From 1957, I was assistant manager of the Opera-

*Testimony of Raymond L. Davis*

tions Department of the Retail Stores Division, Goodyear Tire and Rubber Company, here in Akron.

"Q. Have you been in Akron, the home office, of your employer since 1957?

"A. I have, yes.

"Q. When did you switch over to the position you now have with regard to International?

"A. Yes, I switched over the first of June 1961, as manager of Retail Operations for International.

(The following note was attached to this deposition: "(2 places) Date of trsfr. to GIC was June 1961 (not 1960). Corrections by deponent. TM II.)"

"Q. In brief summary, then, Mr. Davis, would it be accurate to state during the whole course of your employment by Goodyear Tire and Rubber Company, up  
923 until a date in June, 1961, your responsibilities and duties included in large part and for some of the time altogether the operations, management, control, and accounting of the retail stores of your employer?

"A. That is correct. Primarily to a large degree most of the time, but for a couple of or three years, to a degree, but always connected closely with retail.

"Q. Now, then, Mr. Davis, the lawsuit in which this deposition is being taken concerns a retail store, that is the store that serves customers in the area of Memphis, Tennessee, as the dealer or outlet of the General Tire and Rubber Company, so that the frame of reference for my questions is directed to such a store operation, and in respect to any questions I ask about sales or classifications of sales, I would like for you to exclude as inappropriate here such sales as may be made by a manufacturer to an automobile manufacturer, as for example your employer, Goodyear Tire and Rubber Company, to Ford Motor Company.

We are not concerned with that type of sale, and by the

*Testimony of Raymond L. Davis*

same token we are not concerned with any sales in the international market. We are concerned with the  
924 operation of a store in a community in the United States.

Mr. Tinchcr: May I interpose, Counsel?

Mr. Mitchell: Surely.

Mr. Tinchcr: And make this observation. The status of the store involved in this is in question whether it is a retail store or some other classification store. That is a legal question which is to be passed on by the Court and to the extent that counsel has stated that it is a retail store, I would want it understood that it does make what are recognized as retail sales, but it also makes other classes of sales which the Department of Labor insists do not fall into that category.

Mr. Mitchell: I did not mean to beg the question, sir; by retail operation, I meant it is a store which sells customers in a community—in the community in which it is located and does not in any event sell to a manufacturer of automobiles, nor does it engage in international sales, with both of which you are familiar.

The Witness: Yes.

925 By Mr. Mitchell:

“Q. And which I wish to exclude from the frame of reference in which my questions are based.

With regard, Mr. Davis, to sales that are made by one who does serve customers in his community, in the town, for instance, of what would be called a retail store, would you tell us, sir, how much sales are classified or what categories they fall into?

“A. Well, historically, in the tire business, the classification has been strictly two classifications as to the type of sale, that is, a dealer sale which is a sale for resale, and a so-called retail sale includes consumer sales of all types, regardless of the use to which the product is put

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or the price at which it is sold or the quantity in which it is sold or the type of business as long as it is for consumption.

“Q. Now, then, let me be sure I understand this. You say in the industry and historically two categories of sales are recognized. The one is sales for resale which would mean the sales by one who operates a store to someone else who will resell the tire. Is that correct?

“A. Yes.

926 “Q. And you say that all other sales to consumers fall into the second category?

“A. Yes, sir.

“Q. And that a sale is considered to be a consumer sale so long as the purchaser of the tire is going to use it, is that correct?

“A. That is correct.

“Q. And that it matters not the quantity of tires purchased by the consumer or the price paid, the use to which the tires will be put. None of these things affect the fact that the sale to the consumer—to any consumer is all in the same classification?

“A. That is correct. As far as the industry is concerned, as far as we have always recognized it, it has always been a retail sale regardless of the use or the price or the quantity.

“Q. And has that classification of sales by your stores into just the two simple categories regularly and routinely been observed by your company throughout the course of your employment?

“A. It has throughout the course of my employment, since 1933.

927 “Q. Is it still recognized the same?

“A. It is still recognized.

“Q. And from your knowledge by reason of having been in the industry since 1933, can you state whether or



*Testimony of Raymond L. Davis*

not the same classifications are regularly recognized by other components of the industry?

"A. I cannot state as an absolute authority. In my discussions with people representing the industry and others who have company stores, in my contact with Good-year dealers over the period of years which has been fairly extensive, in my opinion, it is recognized throughout the industry as the criterion that a retail sale is a sale for consumption.

"Q. Now, then, sir, you are, I am sure by reason of your long experience with your employer, thoroughly familiar with the records and the systems that it uses for accounting purposes in regard to retail stores?

"A. Yes.

"Q. A number of those, I am sure, have been devised or corrected or checked by you as well as regularly used by you or used by those under your control over a period of years?

"A. Yes, sir, that is correct.

928 "Q. At my request, have you brought with you to this deposition examples of accounting forms or bulletins which illustrate—

"A. I have, yes.

"Q. —the categories which you just described?

"A. Yes.

"Q. Now, then, Mr. Davis, you have produced a single sheet printed on both sides which bears at the upper left hand corner the caption 'Retail Operating Manual B-1A, 3-1-61,' and then the heading centered and in caps underlined, 'Customer Billing'.

I will ask you first, sir, if I construe this properly to be a sheet extracted from a manual that is promulgated and published by your employer, and that it covers or contains directions to bookkeepers or others who will

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be concerned with the preparation of billing for customers?

“A. Yes, sir, this is the page from the manual which is given to all of the Goodyear Tire and Rubber Company retail stores, and has to do with the billing document and the various types of coding which designate the type of business and whether it is charge or cash and is  
929 one page out of that complete manual which probably is most apropos to our present discussion.

Mr. Mitchell: I will ask that be marked as Exhibit 1 to Mr. Davis's deposition.

(The said document was marked as Deposition Exhibit No. 1, Witness Davis, by the Notary.)

By Mr. Mitchell:

“Q. Now, then, Mr. Davis, from the arrangement of the holes at the left edge of the paper for insertion to a looseleaf binder of some sort, I take it that the front page of that sheet is that which is headed ‘Issue 6’ at the upper right hand portion?

“A. That is correct.

“Q. And I take it that that printing and information which appears on the front part of this sheet is just general directions and instructions. It appears to be with regard to categories, marking, and itemizing of billing?

“A. That is true, the preparation of an invoice in a store and carrying a revision date of 3-1-61, which does not mean that the whole sheet was revised. It might be only one insignificant change some place in the sheet.

“Q. And is this the billing instruction that is in current use by the retail stores of your employer?

930 “A. This is the current instructions that are being used.

“Q. Would you designate for us, sir, and describe that part of this exhibit which carries out the definition which you have just stated, or the classification which you have

*Testimony of Raymond L. Davis*

just stated, namely the breakdown of sales by your stores into two categories, those for resale or those to consumers?

“A. Frankly, this is very short and crisp and explicit in that connection. On Page B-1-A, the only reference to classification is the statement ‘Put X in dealer or consumer block at the top of the invoice to designate the class of business’.

“Q. Now, then, sir, would you please just put a bracket or indication around that part of the exhibit to which you just referred?

“A. Yes.

“Q. And for the record and clarity, would you read that part to which you just referred?

“A. ‘Retail and dealer invoice. Heading. Put an X in the dealer or consumer block at top of invoice to designate the class of business’.

“Q. Now, then, I take it that that direction or 931 instruction has reference to a mechanical or manual function which will be carried out by the salesman or clerk who makes the sale, and that this indication of an ‘X’ in a block refers to some part of the printed form used as the sales invoice in your company’s retail stores?

“A. It refers to the block on the invoice which is for the purpose of informing the accounting office what type of sale it is for future accumulation and the instructions, of course, are to the person in the store who is making up the invoice.

“Q. And when, pursuant to the instruction which you have just described, a block, either dealer or consumer, is indicated on the top of the invoice—and I take it that is done at the retail store and coincident with the sale itself—is that same classification followed through consistently in the accounting records by the accounting officers of your employer?

“A. It carries all the way consistently throughout that

*Testimony of Raymond L. Davis*

a sale so marked is a consumer sale and retail, in other words any type of consumer sale.

“Q. Have you at my request brought samples of invoices on which this type of designation would be executed?

“A. I have. You will notice the block right there  
932 where it indicates the dealer or consumer.

Mr. Mitchell: I will ask that this be marked Exhibit 2 to your deposition, Mr. Davis.

(The said document was marked as Deposition Exhibit No. 2, Witness Davis, by the Notary.)

By Mr. Mitchell:

“Q. Now, Mr. Davis, we have had marked as Exhibit 2 to your deposition the sheet out of the invoice which is light green in color and is marked ‘Region Accounting Copy’, and I have extracted that from a set of invoices bound together with carbon inserts in quadruplicate. Do I understand correctly that the green copy of that set which we have marked is the one that stays and becomes part of the permanent records of your company?

“A. Yes, sir, that becomes a record, a permanent record—let me amend that. It would not be a permanent record. It is kept for a certain number of years by the regional accounting office, also, of course, there is a permanent file copy in the store for a certain number of years.

“Q. And does it indicate or does it contain the dealer and consumer block near the top of the invoice  
933 which is to be checked or filled in by a clerk or bookkeeper in one of the Goodyear service stores pursuant to the direction to which you referred a moment ago on your Exhibit 1?

“A. It does.

“Q. And where is that, and would you bracket that on your Exhibit 2?

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“A. Yes, sir, right here.

“Q. Now, you have bracketed two boxes in the upper left hand corner of your Exhibit 2, above one of which is written the number 1, and below that same 1 is written dealer; above the other of which is written the number 2, and below that box is written consumer?

“A. Yes.

“Q. Now, is that the single and sole classification of sales which is made at the store level with regard to every sale through the store?

“A. No, sir.

“Q. How is that designation used and what categories of sales does it cover?

“A. This designation here, 2, covers sales which are not time payment or installment sales. This type of invoice is used on sales to dealers and on sales to 934 consumers where a chattel mortgage or a conditional sales agreement is not taken and where the sale is not on an extended term basis. On those sales, we code them 3, which is simply an accounting code to designate that they are budget sales where we carry a separate statistical summarization on the P and L.

“Q. And the budget sales from what you have just said are sales, payment for which is to be made over a period of months or years?

“A. Yes.

“Q. Are they consumer sales or are they dealer sales in your category?

“A. They are consumer sales in all cases. Even if a dealer were to buy for his own consumption on budget terms, it would be billed on a budget invoice and considered as a retail sale.

“Q. Now, then, am I correct in thinking that all sales through the Goodyear stores would be categorized either as a dealer sale or a consumer sale on the type invoice you

*Testimony of Raymond L. Davis*

have made Exhibit 2 to your testimony, or if the sale terms, the payment terms were to extend over a 935 period of months, a separate kind of invoice of installment sales contract and other such forms would be used for the only third category of sales?

"A. Yes, sir, that is true as of the present time.

"Q. Now, then, except for these installment sales contracts, are all other sales through the Goodyear stores reported and accounted for on Exhibit 2?

"A. All sales to store customers are either reported on this type of invoice or on the budget contract which I referred to as Code 3.

"Q. Right. And it would follow, then, that the two classifications shown on Exhibit 2 are the only two classifications recognized and used in your accounting records?

"A. Yes, sir, as a retail sale. We would possibly have deliveries through the store which are not store sales, and I want to make that clear, which would be deliveries to another store, perhaps, transferred to another store or a transfer to the district with the delivery being to a dealer of the parent district, but those would not enter into the store records as a store sale.

"Q. That would be a transshipment of inventory?

"A. Correct.

936 "Q. To another unit of your own employer's business?

"A. Correct.

"Q. And would not probably be a sale as such at all?

"A. Yes, sir, that is correct.

"Q. Very well, sir. What is the next step in the accounting procedures by your employer, Goodyear Tire and Rubber Company, with regard to sales made through its stores?

"A. These sales and all transactions in the store are summarized on a report called a B-50 Report which goes by the store—which is made by the store and goes into

*Testimony of Raymond L. Davis*

the regional accounting office. The regional accounting office then summarizes all this information through IBM cards toward the production of sales reports and of the —what we call the store operating statement which is a summarization of the sales, current month, year to date, the gross profit, the inventory, the turnover, the expenditures made by the store, and a statistical section which picks up all types of dealer sales, all types of retail sales and all types of budget billing.

“Q. Now, you have referred to that which you have just opened before you headed ‘Monthly Store Operating Statement’?

937 “A. Yes, sir.

“Q. I ask you if you will make that Deposition Exhibit 3 to your deposition, sir?

“A. Yes, sir.

(The said document was marked as Deposition Exhibit No. 3, Witness Davis, by the Notary.)

By Mr. Mitchell:

“Q. Now, then, sir, by reference to this monthly store operating statement which has been made Exhibit 3 to your deposition, would you state in brief, if possible, how the information with respect to a given sale which might have been entered on your Exhibit 3 is accumulated and presented on Exhibit 3, bearing in mind our interest in the categorizing of the sale rather than such information as the name of the purchaser or other data?

“A. I am not a machine accounting expert, so I can only say that these are put on cards, of course IBM cards, but essentially any type invoice which we have looked at here as Exhibit No. 2 will fall into either the dealer or the retail category, depending on whether it is a sale for resale or whether it is a sale for consumption in which case it becomes retail regardless of the price or the quantity purchased or the use to which it is put.

938

The budget sales, then, the Code 3, on a separate



*Testimony of Raymond L. Davis*

type invoice fall into the budget sales category on Line 3 of the operating statement for passenger tires which is merely the test program, more or less, to determine the relative margins available on the two types of business, that is straight retail as compared to budget.

(A note was attached to this deposition as follows: "3rd Par. 4th line should be—"All tires and tubes—Dealer, car, and home and other dealer billing and retail billing of tires & tubes M. A. & T. V. and other and separating—". Correction by deponent. T. M. II').

In addition to that, the billing from the store is then summarized statistically at the bottom section of the P and L from Lines 81 through 89, is further broken down by all tires and tubes—Dealer, car and home and other dealer billing, and retail billing of tire and tubes, MA and TV and other, and separating the budget billing of tires and tubes, major appliance, and other. This operating statement then shows the store the exact sales, 939 the exact gross profit on each of the categories from Lines 1 to 44 and, of course, the expenses incurred by the store resulting in a statement of net profit on Line 79.

"Q. And it appears from inspection of your Exhibit 3 that the same category—that the same use of two categories for sales made through Goodyear Stores is observed on that monthly store operating statement, namely, the sale is classified as the sale to dealer, which I take it from what you said means it is to someone for resale, or it is a retail sale which is to the one who will consume the product?

"A. That is correct. That is the sole test of the classification.

"Q. And again just for clarification, the reference in your testimony to budget which I see here sometimes abbreviated on your Exhibit No. 3 as BUD—



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“A. Right.

“Q. Refers to the fact that the customer is to pay for that over a period of months or years?

“A. Yes, and that is, of course, a retail sale.

“Q. And from the operating statement which you have made Exhibit 3, from the way the information on it is presented, I take it that would refer to a particular store or a particular outlet and for a period of typically one month?

940 “A. That is correct. The store operating statement is made for a particular outlet for a period of a certain calendar month, and with the year to date, totals for the calendar year to date.

It also, of course, is consolidated by us as is a custom in all companies through machine accounting, various units.

“Q. Yes, and is this same form of operating statement used for each and every one of the stores or retail outlets operated by your Company?

“A. I—

“Q. By that, I mean, is the form used, one for each outlet?

“A. Yes, with any domestic company.

“Q. Now, then, I take it within the normal course of accounting, the information from all such monthly store operating statements is accumulated on an overall profit and loss statement or some such date?

“A. Yes.

“Q. And with regard to the accumulation onto the overall profit and loss statement for a period of time with respect to your Goodyear stores, in this same classification of sales into either retail or consumer consistently adhered to?

941 “A. Yes, sir, at all times it shows up as retail sales and dealer sales in every statement. It is simply a consolidation of the total of the individuals.

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“Q. And——

“A. I might add that, of course, this is also—this tabulation also is made by the regional office for the purpose of paying sales tax, and that sales tax is charged and paid on all retail sales as we designate retail sales; that is, sales for consumption, regardless of the price or the use to which they are put or the quantity in which they are purchased.

“Q. And while I recognize that over a period of years there must have been some changes in the form or format of the accounting documents that you have introduced this morning, as a general thing, has this same classification of sales into dealer or consumer types been adhered to and followed by your company throughout the term of your employment by it?

“A. Since January 1, 1934, the essential characteristics have been the same. It has always been—while the forms have varied over the years, there has always been that same division between dealer and retail.

Mr. Mitchell: I believe that is all.

942

**Cross-Examination,**

By Mr. Tincher:

“Q. Mr. Davis, in your testimony you have referred to these stories where your products are sold, and I assume that these forms you have identified and made exhibits to your testimony are forms used in those stores?

“A. Yes, sir.

“Q. Is that correct?

“A. Yes, sir.

“Q. Now, are those stores which are operated by the Goodyear Tire and Rubber Company, under its management?

“A. Yes, sir.

*Testimony of Raymond L. Davis*

“Q. In addition to those stores, do you have outlets for Goodyear’s products where the store or outlet is operated by some independent dealer?

“A. Yes, sir, we have a great share of our distribution through independent dealer organizations.

“Q. Could you give us a rough breakdown of what percentage of your products are sold through company stores as distinguished from those stores operated by independent dealers?

“A. I could give you only an estimate right now. My estimate would be that roughly 70 per cent of our replacement sales are through dealers and approximately 30 per cent through company stores.

943 “Q. Among those dealers, do you have different classifications such as franchise dealers, associate dealers, and so forth?

“A. Yes, sir, we have the franchise dealers or the dealers through our franchise dealers would refer essentially, I think, to what we call direct dealers out of the district, whereas our associate dealers are those terms the smaller dealers who are sold by the key dealer, the franchised dealer, or by the company store if they are the distribution point in that particular area.

“Q. Would it be true that your franchise dealers, as a class, would you make a larger percentage of sales for resale than your associate dealers?

“A. Would you mind repeating that question?

“Q. Would it be true that as a general proposition your franchise dealers would make more sales for resale, a greater percentage of their sales for resale, than your associate dealer?

“A. No, sir, I don’t think so.

“Q. Well, now, I understood you to say that your franchise dealers do supply some of the tires sold by your associate dealers, is that correct or not?

*Testimony of Raymond L. Davis*

944 "A. Yes, sir, that is correct, but the associate dealer is, generally speaking, a service station or a garage who is almost entirely retail sales, whereas, of course, the franchise dealer would have some percentage of wholesale sales, sales for resale, so that his percentage of retail sales would be somewhat less than the associate dealer.

. . . . .

945 By Mr. Tincher:

"Q. Now, Mr. Davis, if you can answer this question, do you know of any franchise dealers which your company has who regularly sell 25 per cent or more of their gross sales for resale purposes?

"A. Yes, sir, I do. I don't know the dealers personally. I know that we have dealers, particularly in the eastern areas of the United States, where some of them actually more or less function as what we call TBA suppliers which means primarily distribution to associate dealers and to service stations.

"Q. Then perhaps even more than 50 per cent?

"A. Yes, sir.

"Q. Of that type of dealers sales would be for resale, is that correct?

"A. Yes, sir.

"Q. Are any of those dealers—do you have, rather, any company dealers, company stores who fall in that category?

"A. Do we have any company stores who would sell a greater percentage than 25 per cent of their sales as wholesale for resale?

"Q. Yes.

"A. Yes, we do.

946 "Q. And also independent dealers?

"A. Yes, sir.

"Q. Does your company keep a list of registered asso-

*Testimony of Raymond L. Davis*

ciate dealers who are supplied by either company stores or independent franchise dealers?

“A. That is a question which I am not able to answer. It is within the realm of the wholesale region and I believe there is some record kept at district level but I could not give you an authoritative answer on that.

“Q. Does your company have a designated price at which franchise dealers are to sell tires to the registered dealers, associate dealers?

“A. There are about five categories of prices of—of dealer prices, and the price at which the franchise dealer or the store sells the associate dealer depends upon the volume of purchases that are made by the associate dealer. There is no suggested price for each individual dealer, only that the general classification of volume is given to determine the buying category.

“Q. All right, within those volume limits, is it true then, that your franchise dealers are required to sell at prices designated by your company?

947 “A. No, sir, the franchise dealer is free to sell at whatever level he wants to. Those are suggested prices.

“Q. Even to your company's registered associate dealers, is that correct?

“A. The—what you call the registered associate dealers would be a list only as supplied by that franchise dealer. In other words, we have no connection with that associate dealer who is supplied by the franchise dealer.

“Q. You have no associate dealers who have contracts or arrangements, purchase arrangements directly with your company?

“A. I don't know whether I exactly understand your question or not. Directly with our company would be only those who are sold through our Goodyear Service Stores which are a subsidiary of the company.

*Testimony of Raymond L. Davis*

"Q. Well, in addition to your company stores, you have so-called independent franchise dealers?

"A. Yes.

"Q. As I understand it?

"A. Yes, sir.

"Q. And those independent franchise dealers generally have certain associate dealers?

948 "A. Yes, sir.

"Q. To whom they supply tires?

"A. Yes.

"Q. Now, my question is: Does the company have any contractual arrangement with those associate dealers or with any of them, to your knowledge?

"A. Not to my knowledge.

"Q. Can any company become as associate dealer in Goodyear tires simply by arranging to buy such tires from one of your franchise dealers for resale?

"A. I would assume they could. I don't think it would be wide open to them. The associate—the franchise dealer undoubtedly would want to establish his own measurements or requirements for that dealership, but if the man were eligible and his credit were good and the associate dealer thought he was a good source of business, I assume that most anyone, if they wanted to resell tires and met those requirements would be eligible.

"Q. Now, you say if he is eligible. Is the franchise dealer free to pass on the eligibility of the associate dealers that he would supply?

"A. I would think within normal reasonable limitations they would be, that is, if a man is in the type of  
949 business that is recognized as being an associate dealer and he is, as I said, a legitimate dealer, one who didn't merely use that as a means to buy tires at a discount.

"Q. Are there any other limits?

*Testimony of Raymond L. Davis*

“A. Well, that is a rather difficult question to answer. I don’t—I have not, have never been very much in the dealer end of our business and I would say that primarily the use to which the tires are put, that is, whether they are going to be resold or whether they are for consumption would determine the franchise dealer’s recognition of whether it was an associate dealer or whether it was a fleet account.

“Q. I take it, then, Mr. Davis, from your testimony that Goodyear does not set up any criteria for determining who qualifies as an associate dealer and does not limit the franchise dealers in their arrangement with various people for associate dealers?

“A. I would say that the only limitation there is the whole industry recognition that an associate dealer is a man who is buying tires for resale.

“Q. Would you know whether there is any restriction as to whether that person has a license to en-  
950      gage in the sale of tires?

“A. That might be true in some states. I don’t know all the state legal requirements, but normally, I don’t think there is any license. In some cities, there is, of course, licenses required, I think.

“Q. I see.

“A. That would be rather after the fact probably, than before.

“Q. Now, does your company have in its usage the term ‘fleet account’?

“A. Yes, sir.

“Q. Would you tell us what that refers to in your sales?

“A. Well, the simplest definition I could give would be an account that has probably five or more trucks that is entitled to a fleet owner’s discount.

Of course, there are sizes of fleet accounts. The size of

*Testimony of Raymond L. Davis*

the account would probably have some determination on the price.

"Q. Would it also include a company that would use five or more passenger cars, for example, by its salesmen?

"A. I don't know whether the category goes as low  
951 as five passenger cars. There are fleet accounts who primarily have nothing but automobiles. Usually it is in larger quantity than that, however.

"Q. Do you know what that quantity is?

"A. No.

"Q. At which they get the first fleet owner discount on passenger vehicles?

"A. I couldn't answer that question.

"Q. Do you know whether, if there are at least ten passenger cars in the fleet account, that that company would be given a fleet owner's discount?

"A. They would be undoubtedly given a discount, whether it would be categorized as a fleet owners' discount, I don't think would follow in all cases.

"Q. Who determines the amount of discount that is to be given in the sale of tires for fleet accounts?

"A. For the fleet account normally the determination rests more or less upon competitive conditions.

"Q. That is the basis for it, but who determines that competitive conditions require such a discount?

"A. There are, frankly, no determinations of the fleet owners that are sold on the dealer's books or the store books as to the amount of discount. I think that would  
952 be more or less a bargaining between the fleet owner and the individual dealer.

"Q. Now, are you saying, then, that the individual dealer determines the amount of discount that he will allow to the various fleet owners to whom he sells tires?

"A. In his area, yes, generally speaking.

"Q. Generally speaking, are there limits on his au-



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thority, or to what extent does the Goodyear Company step in and either independently of the dealer or in working with him determine the amount of discount that would be allowed?

“A. There are certain accounts that are classified as national accounts which are merely a delivery function of the dealer, and where the billing is made by the home office of the Rubber Company or by the District Rubber Company, and on those accounts, there is a set price for those accounts, national accounts, all over the country.

“Q. Now, are the national accounts in a different category than the term ‘fleet accounts’ as used in your company?

“A. They are somewhat interchangeable, but there are certain accounts which are, because of their size, recognized, and because of their widespread operation in more than one market characterized as national accounts.

“Q. Does your company have any fleet account sales  
953 which do not fall into the category of national accounts?

“A. Yes, it does. Excuse me, are you through with your question?

“Q. I intended to ask further, but your answer to that is that it does have, is that correct?

“A. No, sir, I would like to have the question repeated.

“Q. I will try to rephrase it, then.

Does the Goodyear Company make sales in a category determined fleet accounts which are different in category from the national accounts?

“A. Well, I am trying to think. In answering your question, it is beyond my realm, actually, but I would assume that there are some large contractor accounts which probably are by direct sale.

“Q. By direct sale, do you mean negotiated by the company, by Goodyear?

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"A. Yes, sir.

"Q. In those instances, does the dealer bill such customer, or does Goodyear bill the customer?

"A. That will vary. Some cases, the billing will be by the dealer. Other cases, it will be by Goodyear.

"Q. Even when the price may have been negotiated by the company?

954 "A. Generally speaking, the price as negotiated would be with the cooperation and the consent of the individual dealer.

"Q. If the billing is done by the company in that instance, is the sale considered to be a sale by the dealer?

"A. If the dealer does the billing, then it would be a dealer sale. If the company does the billing, then it is simply a delivery arrangement by the dealer.

"Q. And you say that in some instances when it is a delivery arrangement, the dealer may have participated with the company representative in setting the price?

"A. Yes, sir.

"Q. In the national account sales, does the dealer deliver to the customer from general stock, or does he deliver from some segregated stock of tires and equipment?

"A. Generally speaking, from the general stock.

"Q. And does your independent dealer have his stock on inventory which he has purchased and for which he is charged, or does he have stock which is simply there on consignment from the company?

"A. Well, our dealers, of course, could be classed in categories. We have dealers on consigned stock,  
955 and it would depend on whether they are on consigned stock or inventory basis.

"Q. You have franchised dealers in both those categories?

"A. Yes.

*Testimony of Raymond L. Davis*

"Q. Do you have dealers who carry part of their stock as purchased inventory, and part on consignment?

"A. Yes, sir.

"Q. Could you explain how that arrangement works? Whether it is limited to certain categories of stock that would be on consignment, or just how it is set up?

"A. Normally the consigned stock is given to dealers under two—in our system, under two categories, one of which we would call a fixed consignment which is usually less than—isn't by particular units, but by dollar value; usually, less than a thousand dollars; where we might have dealers with a larger consignment, normally within a dollar limitation, so that the dealer might have in some cases practically all of his stock is consigned stock and the majority of cases, however, he would probably carry some stock of his own and would have consignment for a certain value.

"Q. With reference to independent franchise dealers, 956 their sales of tires and tubes, do you know of any situation where they would have on consignment only the stock which would be used to supply the national accounts, but would have other stock in their purchased inventory for sale to other dealers and for retail?

"A. I have no knowledge of such.

"Q. We have been speaking of independent franchise dealers. Does your company have a standard franchise or dealer agreement which it executes with such dealers?

"A. Yes, sir.

"Q. Are all such agreements the same or do you have many different agreements and franchises in form, I mean, in substance?

"A. That question is somewhat out of my realm, but to the best of my knowledge, there is a somewhat standard

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contract. I would assume that there might be a separate subagreement on a consigned account.

"Q. For these franchise dealers, do you have a recognized price list which is furnished to the dealer?

"A. Yes, sir.

"Q. Are all your franchised dealers furnished with the same price list?

957 "A. All franchise dealers do not necessarily buy on the same price list. They are furnished with retail price lists which show a code price. The franchise dealer, then, will buy at a certain discount from code depending on his volume classification.

"Q. Are all your franchise dealers furnished with the same code information to determine the prices they pay to Goodyear for their tires and the prices that are recommended to such dealers for their resale purposes?

"A. They are furnished with the same retail lists and which also show the code prices from which the discounts are based.

. . . . .

958 "Q. Would it be true, Mr. Davis, that according to the code price list used by a franchise dealer that sales to fleet accounts might be as low or lower than the sales to associate dealers for resale purposes?

"A. Yes, sir. It is not figured, generally, from the code list. It is usually a discount from list price. It is possible that it could be lower than the associate dealer price, of certain associate dealers.

959 "Q. Would the price that such fleet accounts pay be determined as a general rule by the volume of purchases, or by other considerations?

"A. I would say as a matter of opinion that the prices probably would be determined by the volume that the account buys and the competitive pricing situation; in

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other words, what the price is being quoted by other tire dealers.

“Q. Now, when the competitive price situation arises, what does the franchise dealer do as a rule?

“A. Well, he attempts to meet that price if he thinks he can make any profit out of the sale. I will put it, the average franchise dealer would do that, not all of them.

“Q. All right. Suppose he finds a competitive situation where the price at which he buys the tires does not permit him to make a profit. Then, does he normally contact some representative of Goodyear and attempt to work out an adjustment of his purchase price for that particular customer in order that he can get the business?

“A. Well, that is a question that is somewhat beyond my realm of knowledge. I don't know whether there would be any attempt on the average dealer's part 960 or not. I think that normally they would attempt to keep that selling price within a scope where their net price, after all their discounts were taken into consideration, would render them some profit.

“Q. But in your various capacities in Oklahoma City, Dallas, other places where you have been working on a district level or regional level in retail division of Goodyear, haven't you had experience with dealers who had to arrange for some special price in order to meet competition with fleet customers?

“A. Yes, there have been instances where they have had—not to retail stores, particularly, but I know there are some cases where they have asked Goodyear for help in meeting the competitive situation.

“Q. And that is not an unusual situation, is it?

“A. I would say it was the exception rather than the rule.

“Q. Well, would it be correct to say that it happens frequently that a franchise dealer would, in the course

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of a year's time, have several occasions when fleet owners would refer to prices that they could get from a competitor, which prices would be so low that the dealer would have to make some special arrangement with Good-  
961 year in order to meet them and make a profit?

"A. Yes, there would be such instances.

"Q. Now, when those instances arise, who, by classification of job, would the dealer work with in trying to get that adjustment in price?

"A. With the Goodyear District Manager who in turn would have to have Akron approval.

"Q. Now, let's assume a situation where in working through the district manager and getting approval of the home office, this franchise dealer is able to meet the competitive price at a rate to the fleet owner which is either less than your franchise dealer's rate, or so little more than his price that he cannot carry through the transaction and make a profit, how does Goodyear adjust the price charged to that franchise dealer in order to permit him to carry through with this special arrangement?

"A. They would give him a reimbursement for his stock and give him a commission on the delivery.

"Q. Would the dealer do the billing in that instance, or would the company?

"A. The dealer would do the billing.

962 "Q. Except for the matter of billing, then, the dealer is carrying on a transaction there which is essentially the same as the national account transaction, isn't he?

"A. Yes.

"Q. He is being reimbursed for the price he pays to Goodyear for the tires and is, in addition, paid a commission for handling the sale?

"A. That is correct, in those instances.

"Q. What commission does he get, Mr. Davis?

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“A. That is a question I cannot give you an absolutely accurate answer on. It is either five per cent or seven and a half per cent and I think that may vary from time to time.

“Q. Do you know whether it has varied in the past?

“A. I am—I cannot give you a definite answer. I think there has been a variance of as much as two and a half per cent.

“Q. In other words, in times when you have been working on the district and regional level, you have known percentages of commissions given to dealers which ranged from five per cent to some figure up to perhaps seven or seven and a half per cent?

“A. That is correct.

963 “Q. Now, in instances where this competitive price has been set and the dealer is reimbursed for the stock delivered and is paid a commission, yet the dealer bills the customer, how is the payment of that account handled?

“A. The customer would pay the dealer.

“Q. Does the dealer, in turn, remit that payment to Goodyear?

“A. No, sir, only for his regular monthly statement.

“Q. But as I understood your answer, he has been reimbursed?

“A. Well, he would be reimbursed by a credit memo.

“Q. Isn't it true that in addition to that, he is receiving a payment of the full amount paid by this customer for the stock delivered?

“A. Well, you asked me a question there I would have to think through. If it were out of his stock, then there probably—or if Goodyear shipped it, there would be a billing to and a credit to the dealer which would simply depend on whether it was a credit or a credit invoice depending on whether Goodyear delivered the stock to him

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or whether it was delivered by the dealer. In other words, the dealer winds up with a net of either—either through payment by the customer for the merchandise delivered plus a commission to Goodyear, or if Goodyear shipped the stock, then, anyway it would come out, whether he secures payment from the customer or whether there is a billing and credit by Goodyear, he would come out with his net commission.

964 “Q. In other words, if he receives payment directly from the customer, then Goodyear makes the necessary bookkeeping adjustment to result in reimbursement to the dealer for his purchase price of that stock plus whatever the commission is that is paid to him?

“A. Yes, in some cases if he delivered out of his own stock, the only reimbursement would be the adjustment which would result in him getting his commission.

“Q. I notice here on Line 4 of Exhibit 3 in your testimony the caption ‘Miscellaneous Sales and Cost Adjustment.’ Is that the line in which such adjustment as you have described would be entered?

“A. You are talking about a retail store now.

Normally, I would have to stop and think whether that would come—that line as you see there varies, is carried only under passenger tires.

“Q. That is correct.

965 “A. And it is primarily to record the credit which comes to the store from what we call quantity lot shipments or quantity lot tube discounts, items of that nature where there is a quantity lot discount which is below the regular store cost, and if there were a credit for that type of delivery, I would assume that it would come under that, although I am not in the accounting end of it now and I couldn’t answer you that with a hundred per cent guarantee that my answer is correct.

“Q. Does Goodyear have some such accounting record



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for its franchise dealers as the one which has been made Exhibit No. 3 to your testimony?

“A. No, that would be the dealer’s own—the dealer would keep his own profit and loss statement, and each would be of a different type. It would not necessarily follow the breakdown that we have in here as to the different departments and lines. I have seen different dealer statements and they will vary as to their character and to the type of breakdown which they have.

“Q. Does your company keep a ledger record for each of its franchise dealers which would reflect the orders received from the dealers, the prices at which the 966 orders are filled, and various adjustments, commissions that are paid, and information of that sort which is comparable to the information shown here on Exhibit 3 for your company-owned stock?

(The following note was attached to this deposition: “9th line—should read—‘They would not have on a district basis—.’ ‘There would be merely the complete file—.’ Deponent’s correction, TM, II.”)

“A. They would not have on a district basis such a profit and loss statement. There would be merely the complete file of credit invoices, memos, and dealers’ statements.

“Q. Does the Goodyear Company have a wholesale division as well as a retail division in its organizational setup?

“A. The operating section of Goodyear is set up as a wholesale operating division and a retail stores division, and in addition there is a retail stores accounting division which comes under the comptrollers department. The general sales organization is set up on an overall basis.

“Q. And the general sales organization would then, I take it, keep records both with respect to retail sales and wholesale sale?

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967 "A. They would have—yes, in the company profit and loss, they would have a record of the amount of the total sales that are retail sales. Beyond that, I couldn't tell you. I don't know how they break them down. I haven't seen a general company breakdown.

"Q. Do you know whether Goodyear treats its franchised dealer accounts as a part of the retail operations, or as a part of its wholesale division?

"A. Franchise dealers?

"Q. Yes.

"A. They would be a part of the wholesale division.

"Q. What division of Goodyear Company makes the sales that are termed national accounts?

"A. There is a division of Goodyear called the National Account Sales Department.

"Q. And does Goodyear treat all of those national account sales as retail sales?

"A. They would be considered as a consumer sale, a retail sale, yes.

"Q. For which the billing is made by the home office, I take it?

"A. The home office and in some cases by the district office.

968 "Q. Are you familiar enough with such billing to know whether state retail sales tax is added to the price that is charged to the customer on those national accounts?

"A. I can only—I cannot give you an accurate answer. I have never seen the billing, but it is my understanding that they are.

"Q. How is the federal excise tax figured on truck tires and passenger tires, Mr. Davis? Could you fill me in on that?

"A. I don't know exactly. I think it has to do with the

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weight of the tire. You mean the basis for establishing the excise tax?

“Q. Yes.

“A. I assume it is based on the weight of the tire.

“Q. And the tax, then, for any particular type of tire would be determined by its weight, rather than by the price at which it is sold?

“A. I think so. The excise tax, shall we say, is standard, whatever price at which the merchandise is sold has no relation to the excise tax.

“Q. And is it correct that the manufacturer pays that federal excise tax to the federal government?

“A. Yes, sir.

969 “Q. And does your company issue instructions to its dealers as to how the excise tax shall be computed and collected by them?

“A. That is a question I can't answer. Not to my knowledge. It is shown on the price list.

“Q. From your acquaintance with the price lists that are sent out by Goodyear to your various franchise dealers, can you say whether there are more than one or several suggested wholesale prices for a particular type and grade of tire?

“A. I don't believe I understand your question.

“Q. Does the price list that is sent to the franchise dealer contain more than one suggested wholesale price?

“A. The price list—it is rather hard for me to answer that because I have been so much more in retail than I have been in wholesale, and probably someone in wholesale could adequately answer you. I believe that all dealers—I know that all dealers receive retail price lists which also show a code price designation. Whether or not they are furnished with what we call the BB prices, from BB-1 to BB-5 which are given to dealers, franchise dealers and associate dealers, I don't know, but I don't

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believe they are. I think rather they are more or  
970 less on the basis of the average—the average dealer  
billing is on a code price less a certain discount  
percentage from that code price which they know and  
which they have knowledge of, what the discounts are  
from this BB-1 to BB-5.

“Q. Will you explain what BB-1 to BB-5 is?

“A. Well, the BB-1 to BB-5 is simply a discount from  
code ranging from 20 per cent to 30 per cent.

“Q. What are the initials BB—what do they have refer-  
ence to?

“A. Billing base, I believe.

“Q. Now, I believe I understood you to say that your  
dealers would know how the discount should be figured  
from the code. Would you explain how you would expect  
your dealers to know that?

(The following note was attached to this deposition:  
“Line 12 should read ‘so we figure it would be 22 and a  
half percent off the code price’—not ‘of the code price.’  
Deponent’s correction, TM, II.”)

“A. Well, there is a suggested range of volume for  
each one of those classifications, and depending on the  
size of the dealer, he would know the discounts which are  
at a higher price level than his own, and in calculat-  
971 ing it, they simply would take the code price and  
say, ‘This dealer is on BB-2,’ so we figure it would  
be 22 and a half percent off the code price.

If you are a BB-3 dealer, they would figure 25 per-  
cent off the code price. That would be their basis for  
billing their associate dealers.

“Q. Then, so far as you know, the franchise dealers  
would simply use the suggested retail price list as a basis  
on which to compute the discounts which would be allowed  
to the various dealers?

“A. To the best of my knowledge, yes.

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“Q. And would they also use that price list in computing the discounts to be allowed fleet operators who are customers of theirs?

“A. I don't think they would normally. I think the normal discount that they would calculate to the fleet account would be based on certain discounts from list price.

“Q. Would that be some different price list?

“A. No, that would be this retail price list that I am speaking of, only that it shows the retail price and it shows a code price.

“Q. And would you say that the dealer would use the retail price list rather than the code price?

972 “Q. And would you say that the dealer would use the retail price list rather than the code price?

“A. Normally in the tire industry, that is the pattern, a discount from list.

“Q. Is a franchised dealer authorized to discount from the code price to the fleet accounts?

“A. Yes. It is up to him. In other words, there is no price stabilization. The prices are suggested retail prices.

“Q. What are the code prices?

“A. The code prices simply represent a point at which a standard discount can be applied for use as billing basis for dealers. Both prices will vary depending on the product, that is the amount of discount from list. You would have a higher discount from list to code on a premium tire or your first-line tire than you would on tires which are lower grade, lower gross profit.

“Q. Is it normal for the franchise dealers to grant discounts which would vary on the basis of the quantity of tires purchased?

973 “A. I suppose there might be some cases that the quantity would determine the discounts they would quote, yes. If there is a big sale of 200 tires as

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opposed to five tires, I think the tendency would be to give a lower price. However, generally, it is more, I think, by the account itself and the annual volume which they anticipate, but I can't say an individual purchase would not influence it.

"Q. When you say it is determined more on the basis of the account itself, how would that enter into the price?

"A. By that I mean here is a man out here with 40 trucks and you know he is buying tires every year for 40 trucks and here is another fellow that has five trucks or three trucks. The tendency, I think, would be to arrive at a buying price for that larger account which probably would represent a lower buying price than the one with five trucks.

"Q. Even though any single transaction might be smaller than the transaction with the owner of the five trucks?

"A. Yes.

"Q. Now, I wish you would explain in a little more detail, Mr. Davis, the inventory transfer operation which takes place, as I understand it, in connection with delivery as to national accounts?

"A. Well, the inventory—are you talking now in 974 terms of the independent dealer or in terms of the store?

"Q. Yes, the independent dealer?

"A. Where the purchase order is given by the national account and it is an authorized national account, the dealer would make his billing for the tires delivered to the Goodyear district office, and he would be credited at his regular buying price plus a commission for the delivery.

"Q. Do you know what that commission is at the present time?

"A. I cannot give you an authoritative answer on that. I haven't reviewed that lately, and I don't know.

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“Q. What was it the last time you knew?

“A. That is what I am trying to think. I believe that it is seven and a half per cent on tires and ten per cent on batteries as I last knew it, but I would not guarantee that that is the figure as of this present moment.

“Q. Is there any such arrangement as that which is in effect with reference to the retreading and recapping of trucks for national accounts?

“A. Largely the retreading for national accounts is on an individual billing basis by the store or dealer. There are, I think, only one or two accounts, to my knowledge, that have a national agreement on retreads.

975 “Q. In those instances where the billing is done by the home office for the retreads, is there a standard price which your independent dealer is allowed for such work, or just how—

“A. Where the billing is by the dealer.

“Q. No, where the billing is by the company.

“A. I think there is a standard price at which Good-year bills them, yes. That I couldn't answer with complete accuracy because I am not absolutely familiar with it.

Mr. Tinker: I believe that is all.

Mr. Mitchell: I have a few questions, Mr. Davis, and we will try to let you get away from here.

**Redirect Examination,**

By Mr. Mitchell:

“Q. With regard to the categories of sales, you have already indicated that the delivery transaction or function at the store level on a national account would be considered a consumer sale, that is a retail sale as opposed to one for resale.

Could you tell us, sir, where the sale itself is actually



*Testimony of Raymond L. Davis*

made in these national account transactions? That  
976 is, who enters into the sales contract?

“A. On a national account, the sales contract would be entered into by our National Account Sales Division.

“Q. And then the delivery function, as you termed it, in an answer or two on cross-examination, which is performed at the store, the retail store level or the franchise dealer level, I take it it could be either one, the payment is made for this delivery function. Would you summarize just briefly what the function includes, that is, what is done at the store or dealer level?

“A. At the store or dealer level to a national account might fall into two categories, one of which would simply be a delivery to the account of the tires in question where those accounts don't maintain their own garage or their own place of service, or it could involve mounting the tires in the store or the dealer's place of business.

“Q. And I take it it is for that function, whichever it may be, by the dealer or the store that an allowance is made or a commission is paid by Goodyear?

“A. That is correct.

“Q. Now, then, sir, with regard to sales to fleet accounts to the extent that they are made at the store or dealer level, how are they categorized, as sales for  
977 retail or consumer sales?

“A. They are consumer sales, and sales tax is charged.

“Q. In some of the questions on cross-examination, you indicate that in certain—I take it rather unusual situations—where your employer steps in and accommodates a dealer or a store in order to meet competition with regard to fleet account sales, you were asked whether or not in that arrangement was it similar to a national account sale? I would ask, if I may, for distinctions. Is that sale in that somewhat unusual situation made by



*Testimony of Raymond L. Davis*

your home office personnel or made by the dealer to a fleet owner?

"A. It is made by the dealer.

"Q. And in that instance, does the customer pay the dealer, or does he pay on a direct billing basis to the home office?

"A. The customer would pay the dealer, unless they were a national account.

"Q. In those two particulars then, is it different from a national account, the typical national account transaction?

"A. It is different in those particulars, yes.

"Q. There was some discussion, I believe, at two places in your testimony about this BB-1 through BB-5 pricing quotation, and I wanted to be sure I understood  
978 what was concerned there as well as clarify the record. Am I correct in thinking that this scheduling of prices which you identify as BB-1 through BB-5 are the prices which Goodyear suggests be used in transactions with an associate dealer or a subdealer or in any event, in a transaction where the sale is for resale?

"A. Yes, sir.

"Q. And so this BB-1 through BB-5 price listing would be the suggested prices to be charged by one of your stores or franchise dealers where it makes a sale to, say, a used car lot or a service station or some other business unit which will resell the Goodyear products?

"A. Yes, sir, that is correct.

"Q. Another retail price listing is suggested by your company which is used as the basis for the computation of all sales to consumers?

"A. Normally, that is true.

"Q. I wanted to be sure of that distinction.

Mr. Mitchell: I believe that is all I have.

*Testimony of Raymond L. Davis*

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**Recross-Examination,**

By Mr. Tinchcr:

"Q. Mr. Davis, in these deliveries made by a franchise dealer to a national account, how does the franchise dealer get the order for such delivery?

"A. To a national account?

"Q. Yes.

"A. It would normally just—let's put it this way. It would come to him because these accounts are set up as nationalized accounts and they probably would issue it to the Goodyear dealer or the general dealer or a dealer in the town where he is headquartered.

"Q. If he is a trucking company, for example, then the local terminal manager would pass the order to the franchise dealer, saying, "I need eight tires this week of a certain type and grade on this national account."

"A. Yes.

"Q. The order then comes directly to the dealer?

"A. Yes, and then he has to transmit that purchase order in with his billing to the Rubber Company, district or branch.

"Q. The particular tires which he delivers to that  
980 terminal then, have not been sold by Goodyear prior to the day that the franchised dealer gets that particular order, is that correct?

"A. Yes. Normally, the franchise dealer would normally have those tires in stock.

"Q. I mean, though, the sale to the national account of those particular tires had not been made prior to the day the terminal manager calls him up and says he needs those eight tires?

"A. I would think that is correct in the majority of cases. I would assume there would be some solicitation, and by solicitation I mean at least the dealer or store

*Testimony of Raymond L. Davis*

would keep in contact with the purchasing agent of that national account, since most national accounts are probably not only national accounts with one rubber company, but probably with all the companies.

“Q. In any of the district offices with which you have been connected or regional offices, have you had over-all supervision over the Memphis area in Tennessee?

“A. Only for one year, in 1955.

“Q. Was there in usage at that time a so-called state list price which was followed by the major tire companies in supplying tires to the state government and various departments of the state government of Tennessee, and certain counties and cities in that state?

“A. I could not answer that with an unqualified yes. I would assume there were, since there are state price lists for practically every state.

“Q. And is it the general practice that such a state price list will carry the same price for various grades and types of tires, whether they are made by Goodyear or by Firestone, or Goodrich, for example?

“A. I couldn't answer that question. I know that we have a state price list, but whether that price list would be exactly the same as the other competitors, I don't know. I think there are cases in my knowledge where I am sure that there are other companies that have a lower state price list than we do.

“Q. How is the state price list arrived at by Goodyear Company.

“A. That is something that is entirely foreign to me. I don't know.

“Q. Could you say whether it is done at the home office level, rather than at the district office level?

982 “A. I would think it is done at the home office level.

“Q. Now, early in your testimony, you stated that it is your understanding that in the tire industry, only the

*Testimony of E. A. Hinderscheid*

two classifications of sales are involved, namely, sales for resale and retail sales?

"A. Yes.

"Q. You are aware, are you not, that such a classification limited to those two categories has been questioned by the National Retail Tire Dealers and Recappers Association?

"A. No, I was not aware of that.

"Q. Are you acquainted with Mr. W. W. Marsh?

"A. No, I am not.

"Q. Have you had any dealings during your employment by Goodyear with representatives of the National Association of Tire Dealers and Recappers?

"A. No, sir.

"Q. Is it your answer, then, that you are not aware that any retail tire associations disagree with your position that all sales of tires and tubes can be grouped simply as sales for resale, or as retail sales?

"A. I was not aware of any difference of opinion, no.

\* \* \* \* \*

985 **DEPOSITION OF E. A. HINDERSCHIED.**

\* \* \* \* \*

987 **"E. A. HINDERSCHIED,**

of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, as hereinafter certified, deposed and testified as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. Will you state your full name, please?

"A. E. A. Hinderscheid.

"Q. What is your home address, sir?

*Testimony of E. A. Hinderscheid*

"A. Today it is 250 Wayne Avenue. It will be changed Friday.

"Q. What has it been in the recent past?

"A. 250 Wayne Avenue.

"Q. Akron, Ohio?

"A. Yes.

"Q. What is your title and what is your employment at the present time?

"A. Trade Sales Division Operating Manager.

"Q. With what employer?

"A. The Firestone Tire and Rubber Company.

"Q. What is your business address?

"A. 1200 Firestone Parkway, Akron, Ohio.

988 "Q. Is that the home office of your employer?

"A. Yes.

"Q. How long have you held that title and that position?

"A. Six years.

"Q. For what period of time in all have you been employed by Firestone Tire and Rubber Company?

"A. Since September 1, 1935.

"Q. In what capacity did you start your employment with that company?

"A. A merchandise control clerk in our branch office in Cleveland.

"Q. For what period of time did you have that position?

"A. Approximately a year.

"Q. To what extent, sir, did your duties and responsibilities in that job have to do with the merchandising of Firestone products through its retail outlets?

"A. Only from a control standpoint.

"Q. And what was the next position you held with that employer?

"A. Store's cashier for approximately one year.

"Q. And in what location, sir?

"A. Cleveland.

*Testimony of E. A. Hinderscheid*

989 "Q. And after that, what position did you pass on to?

"A. Store office and credit manager in the store that was then known as 1800 Euclid in Cleveland.

"Q. In this more nearly supervisory or executive position, did you have a broader responsibility with regard to the merchandising and control of merchandising through the store?

"A. Yes.

"Q. What was your next office?

"A. The next job was store accountant in Cleveland.

"Q. Did your scope and responsibility in that position have to do with a single store or with more than one?

"A. With all the stores in the Cleveland District, numbering some 13 or 14.

"Q. And for about what period of time did you hold that job?

"A. About a little over a year.

"Q. You have indicated that your title in that position was accountant. Did you have anything to do with the audit work of going to these stores to make investigations and examinations?

"A. Yes.

990 "Q. In the course of which, did you become familiar with the merchandising methods and practices, usages in the stores?

"A. Yes.

"Q. Thereafter, sir, what position did you administer?

"A. The next position was store's accountant in our Oklahoma City District, which numbered some 24 stores.

"Q. And was it similar to the job that you had before, except in a different area?

"A. The same job except more stores and more responsibility.

*Testimony of E. A. Hinderscheid*

“Q. And thereafter, sir, what position did you attain?

“A. The next position was store’s auditor.

“Q. At what location?

“A. I had the Akron and Cleveland territory.

“Q. And would you distinguish between the position of auditor which you now are describing and the position of accounting which he had before?

“A. The general difference was this: As the store’s accountant, under my direct supervision, the profit and loss statements, balance sheets were prepared of the stores in the respective district, in the City of Cleveland.

As a Firestone auditor, I audited the books, so to speak, to make sure that the assets as shown by the Accounting Department were correct.

“Q. And over what period of time did you hold this position with the title auditor?

“A. This was approximately two years.

“Q. And thereafter, sir, what was your job?

“A. Thereafter it was division auditor.

“Q. At what location, sir?

“A. My headquarters was in Akron, and I audited the branch offices in the Central Division, which is an area comprised of some eight or nine districts at that time.

“Q. Now, this use of the term ‘branch office,’ I believe for the first time in your testimony, will you describe briefly what that consists of?

“A. Branch office consists of a number of direct dealers in a geographical area, as well as a group of Firestone stores, the administration of which was in the branch office.

“Q. So that while at this point in your business career, you advanced to the branch office level and were still in the accounting part of your company’s operation?

“A. Yes.

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992 "Q. I take it your responsibilities and duties still centered on the retail store or dealer operation?

"A. That is correct.

"Q. And it was those areas of merchandising with which you still had connection and over which you still had control?

"A. That is correct.

"Q. And then after the job at the branch level, what was your next title?

"A. The next position was operating assistant to eastern sales manager, headquarters in Akron.

"Q. And in connection with that position, did you leave the accounting discipline as your accounting specialty and engage in broader responsibilities?

"A. Broader responsibility, including accounting.

"Q. Accounting and what other general areas?

"A. Well, it is rather hard to describe all the duties that an operating assistant has to a sales manager, but it included a broad scope of not only control and accounting, but merchandising as well.

"Q. Again, directed solely to the retail merchandising level?

"A. Both stores and dealers, yes.

993 "Q. And thereafter, sir, what position?

"A. I held that position for two years and then I became operating assistant to the Vice President in charge of trade sales which was the—the other position was eastern sales manager which was half of the United States. The following position was with the Vice President in charge of sales which was all over the United States.

"Q. Now, then, you have used the term trade sales. Will you, for the record, indicate what you mean by that expression?

"A. Trade sales is to be differentiated from sales to manufacturers, which we call original equipment sales.



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Trade sales has nothing to do with original equipment sales.

Trade sales would have to do with sales through stores, to dealers, both direct and associate, mileage account sales, sales to national accounts. That about covers it.

“Q. And I take it from your present title as the operating manager in charge of trade sales, you have advanced on up to your present level in the same end or department, perhaps, of your organization?

“A. That is correct.

“Q. Your duties, today, then extend to managerial 994 and control functions of these retail stores and dealers which are under the trade sales supervision, and would give us the scope or the geographic area of your present responsibility?

“A. United States.

“Q. During your experience for more than 25 years with the Firestone Tire and Rubber Company, have you become familiar, sir, with the classification of sales at the retail level and the usages and definitions respecting sales in the tire industry?

“A. Yes.

“Q. Will you state, sir, into how many categories sales by a company-owned store or a dealer in Firestone products, into how many categories its sales are placed or divided?

“A. I will have to divide that two ways. First, from a product classification, we have classifications from the standpoint of product, passenger tire sales, truck tire sales, tractor tire sales, retread sales, sales of major appliances, and so forth. That is the classification by product.

“Q. I see.

“A. As far as classification by customers is concerned, in Firestone stores, we have two.

*Testimony of E. A. Hinderscheid*

995 "Q. And would you state what they are, sir?

"A. Consumer and dealer.

"Q. And would you state what is included within the dealer category of sales by your company stores or direct dealers in Firestone products?

"A. Any merchandise that is sold for resale.

"Q. And would you state what is included in the other category of sales which you have styled consumer sales?

"A. Everything else that we sell.

"Q. With respect to classifying a sale as a consumer sale according to Firestone's practices, is it of any consequence—strike that, please.

Does the character of the purchase play any part in the determination of whether or not it is a consumer sale?

"A. No.

"Q. Does the use to which the tires will be put by the purchaser play any part in determining whether or not the sale a consumer sale?

"A. No.

"Q. Does the quantity purchased or the frequency of the purchase by the same purchaser play any part in the determination of whether it is a consumer sale?

996 "A. No.

"Q. Does the price paid for the tire or other rubber company product play any part in the determination of whether or not it is a consumer sale?

"A. No.

"Q. I take it from what you have said that the sole distinction is whether or not it is a sale for resale?

"A. That is correct.

"Q. In the event that it is a sale for resale, you use the term dealer in Firestone terminology?

"A. Dealer.

"Q. And is there a synonym recognized by Firestone of retail, the same as consumer sale?

*Testimony of E. A. Hinderscheid*

“A. Well, I would explain it this way: Dealer is a sale for resale. A consumer sale is a sale that is consumed by the consumer.

“Q. But my question is——

Mr. Tincher: May I interpose, Counsel, and again ask that you let the witness give his testimony in his own words. I think it is very important that we not suggest answers here because this is a matter on which the  
997 Court will need all the help it can get.

By Mr. Mitchell:

“Q. Will you state, please, sir, whether or not the term ‘retail sale’ is used by Firestone in its records or in company parlance?

“A. Our accounting documents, as I said before, use ‘consumer’.

“Q. Do you know whether or not, sir, that is synonymous with what is used by other companies and denominated retail sales?

Mr. Tincher: I object, unless proper predicate is laid for that question.

Mr. Mitchell: I think if you will permit the witness to answer, it will obviate the need for a predicate.

The Witness: Frankly, I am not sure what the other companies differentiation is on their store books because I have never seen a profit and loss statement of any of our competitors. I only know what our practice is for many years.

By Mr. Mitchell:

“Q. Now, then, sir, I will hand you a pamphlet  
998 which is on its face ‘Firestone Exhibits and Notes Pertaining Thereto on Retail and Wholesale Sales,’ and I will ask you to look through this set of documents and tell me whether or not you can identify same as being records and the publications of your employer which were or are in current use for accounting or other purposes?

*Testimony of E. A. Hinderscheid*

"A. This was a form we used back when I started with the company in 1935.

"Q. For the record, would you indicate, sir, that what you are referring to bears a 'A' as its identification in that pamphlet?

"A. Yes, at that time, we broke our sales down between dealer and consumer, and in those days, we had an additional classification whereby we broke down service sales. That was for the purposes of administration, to determine how much of the consumer sales were actually sales at a rather high gross profit.

"Q. If I may, sir, would you just to your own satisfaction leaf through that pamphlet to see whether or not you can identify it as exemplifying your company's record presently or past, and thereafter I would like to ask you some questions.

"A. I recognize all of these as Firestone operating statements, Firestone procedure, Firestone letters of detailed preparation of operating statements.

999 Mr. Mitchell: I will ask the Court Reporter, then, to mark that as Exhibit No. 1 to your deposition.

(The said document was marked as Deposition Exhibit No. 1, Witness Hinderscheid, by the Notary.)

Mr. Tinker: I will note an objection to the introduction of this compilation unless it is qualified more fully, I think, than the witness has done so far.

Mr. Mitchell: I appreciate your pointing it out at this time.

By Mr. Mitchell:

"Q. Mr. Hinderscheid, would you refer again to that which has been marked Exhibit 1 to your deposition. You have already indicated your familiarity with and recognition of those forms and bulletins and whatnot contained in that exhibit. Would you say whether or not all of these come from files or come from sources which you are

*Testimony of E. A. Hinderscheid*

familiar with by reason of your experience in the several categories with Firestone that you have already testified about, and constitute documents which you have 1000 frequently used in the course of your employment with Firestone?

“A. Yes. By coincidence, here is my name who prepared this particular profit and loss statement on W. H. Baker who was then manager of our Columbus Fourth and Gay Store.

“Q. And would you indicate for the record that you are pointing out a record, a photostatic copy of which appears as Exhibit B in this pamphlet?

“A. Yes.

\* \* \* \* \*

1001 “Q. Mr. Hinderscheid, do you know that this pamphlet which has now been identified as Exhibit 1 to your deposition, do you know whether or not it came from the files of your company?

“A. Yes.

“Q. In the course of having looked through it, are you prepared to state that those things that are in it are true copies, that is photostatic material, are true copies of documents, the originals of which appear in files available to you and under your custody as a Firestone operations manager?

“A. Yes.

“Q. Further, with regard to the typewritten comments that appear at various places in this exhibit, are you familiar at all with the nature and purpose of the preparation of the exhibit, including those comments?

1002 “A. I am very familiar.

“Q. Would you state what your knowledge of it is, sir?

“A. Well, this—any of these statements in here are

*Testimony of E. A. Hinderscheid*

or represent profit and loss statements that are prepared every month on every Firestone store.

“Q. But I meant more specifically, sir, the typewritten comments which state certain facts about the operating statements, photostatic copies of which are appended. I would prefer not to have to go through and read and have you acknowledge or agree or disagree with each of these comments. I think I may be able to overcome adversary’s objection by asking if you know the context and the arrangement and the reason for the preparation of that exhibit—not that particular page, but this pamphlet as such?

“A. I am not sure I totally understand the question, but I will say this, and I repeat that all of these—I am very familiar with these profit and loss statement forms over the years. Some of them individually here, I am even familiar with the men who were managers in those days.

“Q. Yes, sir.

“A. These are all documents that were taken from Firestone Tire and Rubber Company records.

1003 “Q. Right. My question is: Now, as to the typewritten material, not the accounting documents as such, but the typewritten material that appears at several places, either identifying or describing or stating certain facts about the photostatic copies, and my question is: Do you know for what purpose or in what way this pamphlet, the whole exhibit, was compiled or put together?

“A. This was used in some—I think this was used in some kind of evidence back in the middle fifties apparently to distinguish or attempt to distinguish between Firestone sales classifications between dealer and consumer.

“Q. And did that exhibit come from files or records of Firestone Tire and Rubber Company which are either permanently kept under your custody and supervision, or under the custody and supervision of those employees—

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some employee who would make it available to you on request?

"A. Yes.

Mr. Tincher: I object to the question and move the answer be excluded.

If the witness saw it prepared, or if the exhibit was prepared under his direction, I think he could answer the question, but certainly the fact that it may or—that it may have been prepared from records under his supervision would not make him qualified to identify the exhibit.

Mr. Mitchell: I think you misunderstood my question and I will rephrase it or restate it because the witness may have misunderstood also.

By Mr. Mitchell:

"Q. I am not talking about the papers in this, but the exhibit in the binder?

"A. Yes.

"Q. Did this binder come from records of Firestone Tire and Rubber Company which are either kept under your personal or direct custody or control?

"A. The binder?

"Q. The exhibit as such, yes, sir, this document?

"A. Yes.

"Q. Now, then, sir, with regard to the explanatory material that appears and has a side index and a heading 'Firestone Exhibit,' that would seem to be nothing but an index of exhibits and I don't believe there is any controversy about that.

I will ask you to turn to a page which has typing on it and is the second sheet of this exhibit on which the statement is made, 'It will be noted from the following Firestone exhibits that Firestone uses consumer sales and also uses retail sales and that it uses such quoted terms interchangeably and synonymously' and I

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will ask you to read or refer to the sheets of this exhibit subsequent to that statement and tell me whether or not you can agree with it, or whether or not you disagree with the statement I have just read?

"A. Yes, we use interchangeably retail or consumer, it doesn't make any difference. We differentiate between either of the two and dealer.

"Q. Now, then, sir, would you turn to the next sheet in the exhibit which has the side marginal identification A, and which is headed 'Store Operating Statement, August, 1935,' and I read a typed notation above it to this effect, 'It is to be noted that the only distinction between the various types of merchandise sales is between dealer and consumer. Consumer sales include sales to commercial accounts.' Now, I will ask you whether or not upon a review or upon your own knowledge of the type 1006 operating statement attached to that page whether or not you agree with that statement or disagree with it?

"A. Agree with it.

"Q. And does the accounting statement attached on the same page at the same place in this exhibit illustrate the statement above?

"A. Yes.

"Q. Now, then, sir, I will ask you to turn to the next sheet of this exhibit which has again the side index B and has the title Store Operating Statement, November, 1939, above which appears this in typing, 'It is to be noted that the only distinction between the various types of merchandise sales is between dealer and consumer, consumer sales including sales to commercial accounts?'

"A. That is correct.

"Q. And does the accounting statement which is photostated and appended to this exhibit at this place illustrate that statement?



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“A. Yes.

“Q. Has it been marked, actually, so to do at column heading, namely, consumer and dealer?

“A. Yes.

“Q. I will ask you to turn to the next sheet of this 1007 exhibit which has a side marker C, and which is entitled Store Operating Statement, June, 1945, above which appears the following statement: ‘The only distinction made in classifying sales is between consumer and dealer and the consumer sales include sales to commercial accounts.’ At the bottom of the statement ‘In the analysis of the salesman’s performance, this same principle is followed classifying sales only between consumer and dealer, the commercial sales being included in the consumer figure.’

There is a column on this statement headed budget. ‘The figures shown in this column are simply desired objectives or quotas.’

“A. Yes.

“Q. I will ask you to review the accounting statement at this place in this exhibit, and state whether or not you agree or disagree with the typed material above it?

“A. I agree.

“Q. Does, in fact, the accounting statement shown there make the distinction as stated?

“A. It does.

“Q. And is that consistent with Firestone practice in classifying sales by its stores or its dealers over the 1008 period of time during which you were employed by Firestone?

“A. It does.

“Q. I will ask you to turn to that which is marked D, and which is captioned Store Operating Statement, March, 1949, and refer to the typed material at the top as follows: ‘The only distinction made in classifying sales is between

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consumer and dealer and the consumer sales include sales to commercial accounts.' At the bottom of the statement, 'In the analysis of the salesman's performance this same principle is followed classifying sales only between consumer and dealer. The commercial sales are included in the consumer figure.'

There is a column on this statement headed 'Budget.' 'The figures shown in this column are simply desired objectives or quotas.'

I will ask you if you agree or disagree with that statement based upon a review of the accounting data attached?

"A. I agree.

"Q. Again, is this consistent with the practice regularly employed by Firestone with regard to its accounting for stores or retail dealers during the course of your 1009 employment by that company?

"A. Yes.

"Q. The statements so far A through D obviously referred to different periods of time. Will you state whether or not at the present time and during the interval after 1949 which is referred to on Exhibit D, your company, Firestone, has maintained this same consistent classification in regard to operating statements which may have been revised or whatever, down to date?

"A. Exactly the same.

"Q. On the next sheet of this exhibit is the explanatory statement under the caption 'Store Operating Statement Currently in Use.' The explanatory statement is, 'Again it will be noted that the sales are classified only between consumer sales and dealer sales. This is also true in analyzing the store salesman's performance on the reverse side of the statement. In both instances, the consumer sales figure includes sales to commercial accounts.'

I ask you to turn to the operating statement that appears

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on two sheets and ask you if you agree with the facts I just read?

“A. I agree. This statement that we use today is  
1010 somewhat different, but the breakdown between type of customer is still the same, consumer and dealer.

“Q. Fine, and is that indicated appropriately by an arrow and circle on the operating statement itself?

“A. It is.

“Q. Is it, again, indicated on the reverse side in respect to the part about the salesman's performance?

“A. It is.

“Q. To the next sheet in this exhibit, if you would, please, sir, I read as follows: ‘Excerpts from store chart of accounts starting November 1, 1935, applicable excerpts from store chart of accounts for the fiscal year starting November 1, 1935, in which separate accounts are set up for classifying sales between consumer and dealer. Under these instructions, sales to commercial accounts were included in consumer sales.’

I will ask you to turn the page and review as necessary the chart of accounts on apparently four sheets and see if you agree with the facts I have just stated.

“A. I do.

“Q. And again following this which is headed Exhibit F, a chart of accounts attached following that ex-  
1011 planatory statement, is it also marked by lines and arrows in appropriate places to which places specifically illustrate the statement I have just read?

“A. It does.

“Q. Now, then, sir, turning through to the page which has the letter ‘G’ as a side marker, and which is entitled ‘Store Operating Letter, May, 1938,’ and reading from that page, ‘Applicable excerpts from this operating letter furnish instructions for recording the various types of sales. At this time, the same distinction between consumer

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sales and dealer sales was retailed, but retail sales was used instead of consumer sales in this operating letter which, of course, is different from a chart of accounts, although not specifically spelled out except in the case of gasoline, all sales to commercial accounts were included in retail sales.'

I will ask you to turn the sheet and to examine the three sheets that follow it and see if you agree with the statement I have just read.

"A. I do.

"Q. And again on those three sheets, are certain parts of them enclosed in a box or indicated by arrows  
1012 drawn on them to highlight the fact that those particular indicated parts illustrate the comment I have just read.

"A. They are.

"Q. And if you would turn to the sheet in that exhibit which has a side marker H, and which has on it and is entitled 'Excerpt from Chart of Accounts, Fiscal Year beginning November 1, 1942,' and has the following memo on it, 'This chart of accounts includes specific definitions of "consumer sales" and "dealer sales."' These definitions have been repeated consistently every year since that date. This chart of accounts also provided for a breakdown between consumer sales and dealer sales on each side of the classifications. The accounts for truck tires and tubes should be carefully noted because a high percentage of such consumer sales are made to commercial accounts and emphasize that sales to commercial accounts were included in consumer sales.'

I will ask you to turn the page and to review the one sheet following and state whether or not you agree with the comments I have just read?

"A. I do.

"Q. And again are the particular pertinent parts in-

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licated by being enclosed in boxes and indicated by arrows?

1013 "A. They are.

Mr. Tincher: Counsel, I make no objection to any portion following that which the witness has just immediately prior to this point identified because in going through it, I notice there is no reference to retail sales insofar as breakdown of consumer sales and dealer sales are concerned. There is no question as to the classification by this company or by this witness.

Mr. Mitchell: Well, I think just for consistent presentation and in part at least because of your early objection, I will just go on through it and get this witness's comment as to each of the memoranda or notes that appear in the exhibit.

By Mr. Mitchell:

"Q. I will ask you, therefore, to turn to the sheet of this pamphlet or exhibit which has the letter I at its right margin and which is headed 'Excerpt from District Operating Letter, October 1, 1945,' and which carries this notation, 'Applicable excerpts from an operating letter to district accounting stores covering accounting instructions for stores, primarily for sales analysis purposes.

1014 Please note that in 5 (e) the only sales breakdown required for stores is the classification between consumer sales and dealer sales. Although not spelled out, sales to commercial accounts are included in consumer sales,' and I will ask you to turn to the next sheet and indicate whether or not on review of it if you agree with that comment or notation about it?

"A. I do.

"Q. Again, is the particularly pertinent part indicated by an arrow?

"A. It is.

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"Q. On the next sheet which has the letter J at the right margin and which is headed 'Excerpt from Current Chart of Store Accounts' and which bears this notation, 'This excerpt from current chart for stores shows the repetition of the definitions of "consumer sales" and "dealer sales" which definitions originally were spelled out in 1942. As had been done for more than 20 years, the current accounting system recognizes the distinction between "consumer sales" and "dealer sales" and includes sales to commercial accounts in "consumer sales".'

I will ask you if you will turn the page and look at the next sheet and tell me whether or not, on a review  
1015 of it, you concur in and agree with the memorandum I have just read?

"A. I do.

"Q. Now, then, sir, the last sheet in the exhibit is headed Exhibit A and is styled 'Store Sales and Service Ticket,' and bears on it what I take to be a store invoice and has at the top this notation, 'This is a sample of the sales and service ticket in use at all company-owned stores and many dealer-operated stores. Substantially the same sales and service ticket has been in use for over 20 years. It provides for only two classes of sales—"dealer" and "consumer". Sales to commercial accounts being designated as "consumer".'

I will ask you if upon an inspection of the invoice there attached you agree with the notation?

"A. Yes.

"Q. And in the lower right hand corner is the place for the designation circle?

"A. It is.

"Q. Now, sir, having reviewed in gross detail the particular memoranda or notations which appear in your Exhibit 1, and having reviewed to your own satisfaction the

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accounting documents or bulletins to which those  
1016 notations refer, I will ask you if each and all of  
those notations reflects your own understanding of  
your company's position and views in classifying accounts  
—classifying sales by its retail stores or through its inde-  
pendent or retail dealers?

“A. That is correct.

“Q. Are the accounting records which are in use by  
your employer, Firestone Tire and Rubber Company, today  
consistent with those exemplified in your Exhibit 1 in re-  
spect to this classification of sales by your stores or deal-  
ers as either sales for resale which bear the notation  
'dealer' or as sales to consumer which apparently bear  
the notation or caption 'consumer sales'?

“A. They are exactly the same as far as all Firestone  
Company-owned stores are concerned, and while I can't  
answer with the same degree of sureness as far as our  
4200 direct dealers are concerned, it is my understanding  
that practically all of our dealers would have the same  
classification.

“Q. But with regard to the stores that Firestone itself  
operates, this classification, as I understand your testi-  
mony, is maintained today?

1017 “A. Is exactly the same.

“Q. Right. Now, then, sir, in addition to this clas-  
sification of sales at your retail level into dealer and con-  
sumer, for accounting purposes and billing purposes and  
whatever else these documents refer to, can you tell us  
of any other instance in which that same classification is  
adhered to by Firestone Tire and Rubber Company in  
connection with the operation of its stores. To make my  
question perhaps a little more clear, does it in any way  
enter into any provisions of lease contracts, for example,  
in which Firestone Tire and Rubber Company may enter

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for the use and occupancy of premises for its own company stores?

"A. In all of these lease arrangements that Firestone has where there is a—where part of the rental is based on the sales volume, in each of those cases, the rental fee is based on consumer and not dealer.

"Q. So that if I understand you correctly, those sales which are categorized as consumer sales enter into the amount of rent in some cases which Firestone Tire and Rubber Company pays for the premises occupied in some cases by its company stores?

"A. That is correct.

1018 "Q. Now, in deriving or defining this term, 'consumer sales' for the purpose of such lease provisions, what is included within the term?

"A. Any sale that is not a sale for resale. We make no distinction as to a different type of consumer sale. We just have two classifications. Merchandise is either sold to a dealer for resale, or it is sold to the consumer who consumes it.

"Q. And in applying the term 'consumer sales' for purposes of the lease agreements, does the term 'consumer sales' include sales to commercial accounts?

"A. It does.

"Q. Now, then, Mr. Hinderscheid, if you would, sir, tell us—you have indicated at one or two points in your testimony already, but would you tell us the number of retail stores that are operated by your employer, Firestone Tire and Rubber Company?

"A. Firestone operates approximately—I may be off one or two—approximately 780 stores, of which approximately 30 are what we call one hundred percent whole-sale stores. The other 750, approximately are retail stores.



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“Q. In addition to that, does Firestone have dealers  
1019 that sell its products but are not owned or controlled as such by Firestone Tire and Rubber Company?

“A. Yes, we have approximately—we have approximately, all told, some 13,000 direct dealers. I use the term 4200 to designate those that are perhaps larger stores.

“Q. And would you explain briefly what the term direct dealer means in that connotation?

“A. A direct dealer is a dealer who buys his merchandise direct from the Firestone Tire and Rubber Company which is comprised of 50 branch offices in the United States.

“Q. In addition to that, are Firestone Tire and Rubber Company products handled or sold at the retail level through any other outlets?

“A. The other outlets that Firestone products are sold through are what we call associate dealers, numbering some 40 to 50 thousand who buy their merchandise from either a Firestone Store or a Firestone direct dealer.

“Q. And did you give us the name of such approximately 50,000 people?

“A. Associate dealers.

“Q. Am I correct in thinking, then, that the distinction  
between your category of associate dealer and direct  
1020 dealer is that which the term ‘direct dealer’ implies, namely that a direct dealer buys directly from a branch or district of Firestone Tire and Rubber Company?

“A. Yes.

“Q. Whereas an associate dealer would buy from one of your company stores or one of the direct dealers?

“A. That is correct.

“Q. Or, I presume it would buy from more than one, but at least that is true?

“A. Yes.

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“Q. Would you indicate briefly what the chain of command or chain of organization may be for this trade sales department which you have already explained?

“A. The trade sales organization, do you want names?

“Q. No, sir, just the title and power?

“A. Trade sales organization is headed up by the position of general trade sales manager. In the home office, there are several staff positions which report directly to the general trade sales manager such as managers of various product sales such as merchandising manager, such as advertising manager, such as manager of dealer sales, such as manager of Firestone Stores, such as 1021 operating manager, such as manager of mileage sale, such as personnel manager, such as manager of sales training. There may be a few more.

“Q. And are all of those positions which you have just named, would they be identified as home office positions?

“A. They are home office positions.

“Q. Now, then, in your Sales Department, what is the method of control, that is the chain of command, for domestic, that is, United States sales?

“A. United States, outside of home office administration, the United States is broken down into six sales divisions located in New York, Akron, Atlanta, Dallas, Los Angeles, and Chicago.

“Q. And while I don't think the actual locations are important, but is your division, the six divisions you described, further subdivided into regions or districts or in any manner?

“A. The six sales divisions are further divided into 50 districts or branches. The 50 branches are further broken down from the standpoint of company stores into approximately 780, and also territory-wise, into some 13,000 direct dealers, and on down into associate dealers buying from

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direct dealers, and company-owned stores into some approximate 40 or 50 thousand.

1022 “Q. Now, then, sir, the term is used in the rubber industry ‘national account sales’, and I would like if you would, sir, give us the benefit of a brief description of what a national account sale is, and the kind of transaction it involved?

“A. A national account, as the name implies, is a customer whose locations are national in scope, who gets his—picks up his merchandise from either direct dealers or Firestone stores. A national account is the type of account that would buy at least some 50 thousand dollars or more in annual volume.

All national accounts are billed on home office bills at two levels, home office or division sales manager level.

“Q. And may I interrupt here, please, sir, how many men at home office would be entitled or authorized to enter into a national account transaction or agreement?

“A. With the exception of the stenographers and so-called clerks, there is one manager of national account sales at the home office level, and each division, numbering six, has a manager of national sales.

“Q. I believe you may have misunderstood my question and I may have slurred or let my voice drop. My question was as to the personnel who had the authority  
1023 to enter into a national account agreement, and I think I can gainsay the fact that a stenographer or a clerk would not.

“A. The final approval on a national account agreement is at the discretion of the general trade sales manager.

“Q. Now, then, you indicated that he had representatives at each of the six division offices of your company’s sales department. Does he have a single representative at each one of these six divisions?

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“A. He has a single representative at each of the six divisions, and he has a home office representative in Akron.

“Q. So that in terms of authority to make national account agreements, that authority vests in six individuals at division level and in, of course, their superior at the home office?

“A. Actually, at the division level, those representatives do not have the authority to enter into any particular price agreement, nor does the manager of national account sales at the home office level have that authority. That authority, final authority, rests with the general trade sales manager.

“Q. Well, what is it that these six individuals, one 1024 each at your six divisions, what is their function?

“A. Their function is to solicit the sales from present national accounts and solicit sales to new national accounts which we presently do not sell.

“Q. And then when the solicitation is made and terms are being discussed as I understood it from your earlier testimony, they must get confirmation from a particular individual at the home office before any binding agreement is to be made?

“A. That is correct.

“Q. Now, then, does anyone below the division level—that is, at the district level or at one of your company stores, or possibly even at one of your direct dealers, have any authority to engage Firestone Tire and Rubber Company in one of these national account transactions?

“A. Under no circumstances from the standpoint of price or any unusual—no price, no contract.

“Q. Now, sir, if we may, I would like to trace one of these national account transactions through the apparatus to serve your national accounts in the Firestone organization and my first question is: Let's take a case in which a

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national account agreement has been made between  
1025 Firestone Tire and Rubber Company and some  
national concern. Is any service rendered under  
that national account agreement by one of your associate  
dealers?

“A. No.

“Q. Can service be rendered pursuant to that agree-  
ment by one of your direct dealers as well as by one of  
your company stores?

“A. Yes. I should qualify the first statement. I can't  
say that there has never been a case where an associate  
dealer does not deliver something to a national account.  
If it did happen, it would be in one case out of 10,000.

“Q. Well, we can confine my inquiry to the extent that  
you want to qualify it, but my inquiry will be to the  
typical pattern of the national account transaction and  
sale.

Now, then, at—let's take a direct dealer's location.  
What happens when a national account, representative of  
a national account comes in, and let's say that the vehicle  
he brings in is a truck and in accordance with some  
national account agreement between his home office one  
of the gentlemen you have described in the managment of  
Firestone, he is entitled to buy under this agree-  
ment?

1026 “A. As a—there are different agreements, of  
course, as far as national accounts are concerned,  
but the general procedure is for the particular piece of  
equipment, be it passenger car or small truck, would come  
into a dealer's place of business, present certain identifica-  
tion, or a purchase order, and again the national accounts  
vary as to their policy; present a certain document call-  
ing for the delivery of certain merchandise.

The dealer, based on this identification or purchase  
order, would deliver the merchandise to the national

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account. In most cases, he would install it on the wheel, or install it in the car in case it would be a battery.

At that time, he would prepare not the sales ticket that we see here, but he would prepare what we call a transfer order. The name of the national account would be shown at the top, purchase order number would be shown, description and quantities of the merchandise would be shown on the transfer order, excluding price, and that transfer order is then sent to the respective Firestone accounting office at which time a merchandise credit would be passed to the dealer delivering the merchandise which would be to reimburse the dealer for his cost 1027 of the merchandise delivered and at that time, a commission passed to the dealer for the service that he was rendering.

"Q. And now this commission that passes to the dealer as you have just last stated is for services as you state. How and what are the services rendered by such a direct dealer in that kind of transaction?

"A. Well, the service rendered to start with is having available merchandise. The dealer has to buy that merchandise and has had to warehouse the merchandise. He has his money invested in the tires, and then he delivers it to the national account. As I mentioned in most cases, the merchandise is installed on the wheels or in the equipment of the—of the equipment, and the preparation of the documents which transfer the merchandise, in effect, to the home office where it is billed on the home office billing. It is for those services that a commission is passed on to the dealer.

"Q. All right, sir. Does the dealer who is a direct dealer of Firestone products have anything to do with the billing of the national account customer?

"A. He has nothing to do with the billing other than to prepare the transfer ticket. He doesn't even know what the price is.

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1028 "Q. That was my next question. Would he have the price at which the national account was going to pay?

"A. No.

"Q. Does he have anything to do with collecting from the national account customer?

"A. He has nothing to do with the collection.

"Q. And I think you have already indicated that he had nothing to do with the establishment of the price at which the transaction took place?

"A. That is correct.

"Q. In the event of some adjustment that might have to be made, at what level would that occur? That is, where does the national account customer come to advise a complaint, or to seek to have some adjustment, either because of poor performance of the product, or otherwise?

"A. The chain of events there would be for the national account to register his complaint with his home office, and the home office of the national account would then get in touch or complain to either the national account's manager at the division level, or in some cases direct to the manager of national accounts at Akron.

1029 "Q. Now, I believe you may have already stated this, but I wanted to be sure the record was clear on it. You indicated that at the time this transfer slip, in lieu of a regular sales invoice, is made out by the direct dealer reflecting the merchandise that was delivered to and possibly installed on a national account vehicle, at the time that transfer ticket is presented, an adjustment is made for the cost to the dealer, and that is the point I wanted to get, of the merchandise delivered?

"A. We call it a merchandise credit. The dealer's current buying price—I will give you an example to point out the transaction.

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A dealer perhaps purchased one hundred, or whatever the amount was, of 670-115 passenger tires, the net cost to him might be \$15 of each of the tires, totaling \$60 for the four.

At the time that the accounting office receives this transfer ticket from the direct dealer, they determine the dealer's buying price and at that time they pass a merchandise credit to the dealer for the \$60 which relieves him of the cost of the merchandise and at the same time passes him a delivery commission for service rendered.

Mr. Mitchell: I believe that is all I have.

1030

**Cross-Examination,**

By Mr. Tinchler:

"Q. Mr. Hinderscheid, in speaking of the procedure by which a dealer will serve a national account, you referred to some requirement that the purchaser make proper identification. Would you elaborate on that a little bit?

"A. Well, various national accounts have different procedures. Some of them is to prepare a purchase order which indicates the name of a company, the name of the dealer, and the merchandise to be purchased. Others, in the minority, would have—the salesman in the truck or the car, would merely have a personal identification with a purchase order. The majority of national accounts use the purchase order system. The minority of national accounts do not. Generally speaking, the salesman or the driver of the automobile equipment coming into the dealer's place of business, that salesman would have it previously approved through a purchase order to purchase or pick up X merchandise, whether it be a battery or a tire or some other part. It is generally, in practically all cases, confined to tires and batteries.

"Q. Are some of the national accounts served through



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your direct dealers simply by having a credit card  
1031 or something similar to a credit card?

“A. That may be his means of identification, but, again, I am talking about the general scope of merchandise. The dealer does not bill the national account from his own books which would assume the use of a credit card. Now, that is where the most general merchandise that is picked up, however, there may be cases where a national account would come in and say he wanted to get his car lubricated, for whatever price. There may be some national accounts, few in number, where that would be good locally, but the very large—very large majority of merchandise or service that is picked up, so to speak, by the national account is tires and batteries.

“Q. I notice here from letter No. 12 which appears in your Exhibit No. 1, Paragraph No. 4, sales to national accounts, this sentence——

“A. Under which section?

“Q. Letter No. 12, sales transactions?

“A. All right.

“Q. The last sentence under Paragraph No. 4, ‘Stores making such deliveries will receive full sales credit and profit from the transaction’.

1032 Is that consistent with your testimony that the delivering store or dealer is issued by your company a credit slip, I believe you said, and then is paid a commission for the service he performs?

“A. You are now talking about a Firestone Store?

“Q. Is that the distinction?

“A. Are you talking about a Firestone Store or a Firestone dealer?

“Q. I am asking you whether this reference here in Paragraph No. 4 relates to the same thing that your testimony did when you testified that after delivery has been made to a national account customer, the dealer is given a credit——

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"A. Merchandise credit.

"Q. —merchandise credit for that delivery?

"A. That is correct in the case of a dealer. In the case of a Firestone Store, it is still correct except that in the case of a Firestone Store, when we pass the merchandise credit back to the Firestone Company Store, that has the same effect as a merchandise credit to the dealer. It relieves the store of the cost of the merchandise that he delivered to the national account, but in addition, 1033 as far as a Firestone Company-owned store is concerned, at that same time, two tickets are passed to the company store, one of which is a sales value and the other one is 90 per cent of that sales value, which permits the store to make ten percent in the form of commission exactly the same as the dealer.

"Q. Does the dealer get a ten per cent commission for such a transaction?

"A. He does.

"Q. And on what is the ten percent based?

"A. We have—we have a certain price level, so to speak, in our system of discounts where we take that particular level at X discount.

"Q. Would that be, generally speaking, the price at which he has bought the tires?

"A. Not necessarily.

"Q. Would it be normally more or normally less, or how would it compare?

"A. Oh, it would be a higher price than he had bought the tire. It all depends on which type of dealer it was, because a dealer is based on volume and buy their products at different prices because of the volume differential, and so forth. We strike a level somewhere in our 1034 system of discounts on which we compute the ten per cent.

"Q. And generally speaking, then, would it be true that

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the ten per cent commission paid to your direct dealer is not less than ten per cent of the cost to him at which such merchandise had been billed originally?

"A. It would not be less than he—he would end up getting not less than ten per cent.

"Q. But in the case of a store, the store is given credit for making a sale, is that it?

"A. He ultimately ends up with a sales value of, say a hundred. At the same time a charge comes through at a cost of 90 which permits him to make ten per cent commission.

Mr. Tincher: May we go off the record?

(Discussion off the record.)

By Mr. Tincher:

"Q. Mr. Hinderscheid, after a merchandise credit has been issued to the dealer by Firestone, is that credit then recorded in any of the accounting forms which are included here in your Exhibit No. 1?

"A. Not in these exhibits because these exhibits are Firestone Stores' profit and loss statements.

"Q. All right.

1035 "A. There is no form in here that has to do with a dealer.

"Q. Does Firestone get from its direct dealers any balance sheet or profit and loss statement which would reflect the merchandise credit the company allows on these national account transactions?

"A. We have some dealers who are small in number which gives their local district office a statement of sales and expenses in gross monthly or quarterly, with the idea in mind that the district will be able to point out from that P and L statement weaknesses whereby the dealer should do more of this or that or the other thing to help him in his business.

"Q. Then I take it that as a general rule, your direct

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dealers do not provide Firestone with profit and loss statements or balance sheets?

"A. That is correct.

"Q. I understood your testimony earlier in response to questions from Mr. Mitchell to indicate that merchandise credit to the dealer is given at the dealer's buying price for the particular item delivered to a national account?

"A. Current buying price.

"Q. That is my question. Is that the current buying 1036 price of the dealer?

"A. Yes. That is understandable because the dealer delivers, for example, four tires. The dealer may have purchased those tires a week ago, six weeks ago, or six months ago at which time the price might have been different. We have no way of determining at what price those four particular tires were purchased at, so what we do is to take the current dealer's buying price of the merchandise and pass the credit, only for the reason we don't know what price he bought them at.

"Q. Mr. Hinderscheid, on the second sheet in this folder which has been made Exhibit 1 to your deposition, there is this paragraph 'It will be noted from the following Firestone exhibits that Firestone uses "consumer" sales and also uses "retail" sales and that it uses such quoted terms interchangeably and synonymously.' In any of the accounting procedures which you have followed during the course of your employment by Firestone, have you used the term 'retail', and if so, in what connection?

"A. Over the years there have been—sometimes we would call sales other than dealers retail, other times consumer; for the past many years, consumer.

1037 "Q. Would you say, then, that since the year 1950, for example, would it be correct to say that the

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company has not used the term 'retail sales' in its accounting procedures?

"A. I would say that is right.

"Q. Then, if I am correct in thumbing through your Exhibit No. 1, only in that section which is tabbed G is the term 'retail sales' used, and I will read from the paragraph which appears on the sheet captioned 'Firestone Exhibit G, Store Operating Letter, May, 1938.'

'Applicable excerpts from this operating letter furnish instructions for recording various types of sales. At this time, the same distinction between consumer sales and dealer sales was maintained, but "retail sales" was used instead of "consumer sales" in this operating letter, which, of course, is different from a chart of accounts. Although not specifically spelled out, except in the case of gasoline, all sales to commercial accounts were included in "retail sales".'

"Do you know why the term 'retail sales' was used in the particular transactions referred to here in this Section G of your Exhibit No. 1?

1038 "A. No.

"Q. Did you participate in any way in the preparation of this Section G, the paragraph I have read or the sheets which follow that and which are within the section which is tabbed with a G?

"A. In 1938, my capacity was not the preparation of policy or sales letters. In 1938, I was working in the field as stores accountant.

"Q. Would the operating instructions contained in letter No. 13, which letter has been dated May, 1938, would such operating instructions have been in effect any time since 1950 in your company?

"A. I am not sure I understand your question.

"Q. Suppose you look at this Section G, particularly the second sheet in that section which is headed 'Letter

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No. 12,' and indicates four pages, and states 'Effective May, 1938.' Would you look at that entire section and then tell us whether the operating instructions contained in that letter are, in substance, the same as the operating instructions you have followed at any time since 1950?

For clarification and to save time, I have reference only to that section which is headed "Retail Sales," 1039 and any material within these pages which specifically refers to retail sales?

"A. Let me try to answer your question this way: As far as any references to commercial sales are concerned, commercial sales in 1938 were included in retail sales and commercial sales are included in consumer sales which is the terminology that we use today.

As far as any reference to national accounts are concerned, I do not remember back in 1938 exactly what our program was at that time, but for the past ten years, a sale to a national account is construed to be a delivery by the Firestone Store to the national account with the proper transfer ticket being prepared which ends up billing the account on the home office books.

"Q. For clarification, will you examine your Exhibit No. 1 and state whether or not four pages are included of this letter No. 12 which indicates on its first page four pages? This is in Section G?

"A. I am not clear on your question.

"Q. Do you find that there are four pages, in fact?

"A. I find four pages, yes.

"Q. Well, of letter No. 13, isn't it a fact that only 1040 page 1 and page 2 are included?

"A. That is correct.

"Q. I just wanted to be sure that my particular copy hadn't left out some pages.

Do you know when the Firestone Company discontinued its use of the term "retail sales" in connection with the

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type sales that were referred to here in letter No. 12 as "retail sales"?

"A. I do not remember.

"Q. Do you know whether it was sometime prior to 1950?

Mr. Mitchell: May I suggest the discontinuance of the particular term could well be something which the witness has already indicated he doesn't have any particular memory of, but I might suggest, it could refresh his memory if he would turn to letter N-5 which follows exhibit or is a part of Exhibit 1, and which, as I see it, is dated in October—dated October 1, 1945, and which would apparently reflect a return to the use of the term "consumer," and if perhaps that would facilitate his recollection of the re-emergence of this term "consumer". It might expedite things.

1041 By Mr. Tinker:

"Q. Can you now answer the question?

"A. Off the record?

(Discussion off the record.)

Mr. Mitchell: Would you please restate substantially what you just said?

The Witness: I do not remember exactly the date as to when the terminology might have been changed from "retail" to "consumer". It could very well be that a sales manager that we had several years ago preferred the use of the terminology "retail". It could be that some years later a sales manager determined that he liked the word "consumer" better, but for the past approximate ten years, we have stayed with the word "consumer", to mean merchandise sold to any type of customer other than dealer.

By Mr. Tinker:

"Q. Now, Mr. Hinderscheid, would it be fair to say

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that some of the sales classified by Firestone as consumer sales are, in fact, wholesale sales?

"A. A wholesale sale is a sale to a dealer for resale, and in our policies and procedures, it has nothing to do with a consumer sale.

1042 "Q. Then, from your experience working with Firestone, you consider that wholesale sale would refer only to sales to dealers for resale purposes?

"A. That is right.

"Q. And based on the same experience, you would state that any other sale would be in the category of retail sales, is that correct?

"A. Retail or consumer.

"Q. All right, now, do you in your experience with the company find that any of the consumer sales made by your company or by its dealers would fall into a category which you would class as non-retail sales?

"A. No.

"Q. In what category does your company, for accounting purposes, place its national account sales as you have stated in quantities or volume of \$50,000 per year or more as retail sales?

"A. Any sale in any volume to a national account sale is considered a consumer sale.

"Q. But my question is: Do you also consider it a retail sale?

"A. I make no distinction between consumer and retail.

1043 "Q. Do you consider a sale to a national account in the same category with respect to classifying it as a retail sale as a fleet sale by one of Firestone's direct dealers?

"A. Yes.

"Q. What does the term 'fleet sale' normally involve?



*Testimony of E. A. Hinderscheid*

“A. A fleet sale would normally be a sale to a consumer account who may have five trucks or more.

“Q. All right. Does the sale price to a fleet account which has, let's say, five vehicles—correction, withdraw that.

Is the price which your dealers charge to an account with five vehicles the same as the price that he would charge to a fleet account with 20 vehicles?

“A. They might be the same, they might be different.

“Q. Normally, which price would be lower per unit?

“A. Normally, the sale to the larger account would be the lower one.

“Q. Would the sale price to your company's national accounts normally be lower per unit than the sale price which a dealer would quote and use in making sales to a fleet account of 20 vehicles?

1044 “A. Not necessarily, because the price that a so-called fleet account pays has no bearing whatsoever on the price that a national account pays. There are market conditions, the size of the account, and other things that determine the price that the consumer pays for the merchandise.

“Q. Generally, though, Mr. Hinderscheid, isn't it true that the prices charged to your national accounts are lower than the prices which your dealer can sell fleet accounts and make a profit?

“A. Not necessarily, no.

“Q. Is that sometimes the case?

“A. There may be cases where a fleet account buys at a price less than a national account buys at. There may be cases where a national account would pay prices lower than what a fleet account would pay.

“Q. Would it also be true that in some cases a national account price might be lower than the prices at which Firestone sells tires to its direct dealers?

*Testimony of E. A. Hinderscheid*

"A. There would be.

"Q. Isn't it true, isn't that a fact that it sometimes is lower?

"A. I would say in the minority, but there are cases.

1045 "Q. All right, and when those sales are made by your company to a national account at a price which is lower than the price which you charge your direct dealer, you would still classify that national account sale as a retail sale?

"A. Retail or consumer.

"Q. Would you class it as a retail sale?

"A. For the past ten years, we have classified them as consumer sales.

"Q. Would you state whether in your experience in the sales and accounting field, you would classify your sales to national accounts as retail sales?

"A. Over the past many years, we have always classified a sale to a national account as either retail or consumer.

"Q. I don't understand your language, retail or consumer?

"A. I use it interchangeably. Sometimes we call it retail as reflected by operating letter No. 12 dated 1938. Subsequent letters use the terminology as consumer.

"Q. Well, in the past ten years in the accounting procedures of your company, would the national account sales be properly classified as retail sales?

"A. The past ten years, they would be properly classified as consumer sales.

"Q. But not as retail sales?

1046 "A. Again, I repeat, retail and—the term retail and the term consumer are used interchangeably.

"Q. By whom?

"A. By Firestone.

"Q. By you in your accounting practices?

*Testimony of E. A. Hinderscheid*

“A. In our accounting and in our overall sales policies. There is no distinction.

“Q. Isn't it true that, as a matter of fact, you don't use the classification retail at all during the past ten years?

“A. We used the word ‘consumer’ during the past ten years?

“Q. Yes.

“A. Only to differentiate from dealer.

“Q. Then, why do you say that you use the term consumer sales and retail sales interchangeably?

“A. As I mentioned previously, it could be that back in 1938 a sales manager preferred to use the word ‘retail’. In the past ten years, our sales manager has apparently preferred to use the word ‘consumer’.

“Q. Now, I am sure you are not attempting to evade my question, Mr. Hinderscheid, but I seem to have trouble getting a direct answer from you, and this question relates only to the period of time in recent years, and 1047 for convenience, we will say during the past ten years. Do you, in your accounting procedures, use the term ‘retail’ in connection with your sales to national accounts?

Mr. Mitchell: Just a moment.

The Witness: Use the word “consumer”.

Mr. Mitchell: Just a moment. The word “evade” having come into the record, I think it is apparent that the witness's intention and effort is altogether to the contrary, and the witness has sought manfully to answer the same question several times.

Might I suggest, Counsel, that if you introduce the time element as to the interchangeable use, that is whether or not Firestone at any given time, used the term interchangeably, you might clarify the situation. I don't know that you would, but I do not want this record to include

*Testimony of E. A. Hinderscheid*

any reflection on evasion when it has absolutely no application.

Mr. Tincher: Thank you, Counsel.

I was not implying that the witness was attempting to evade. The time element has been limited in my question to recent years. For convenience, we used the term the past ten years.

1048 By Mr. Tincher:

“Q. Have you, during the past ten years at any time, used the terms ‘consumer sales’ and ‘retail sales’ interchangeably in your accounting practices for Firestone?

“A. To my knowledge, during the past ten years we have consistently used the word ‘consumer sales’ to differentiate from dealer sales, and any sale to a national account, commercial account, of any size, is construed to be consumer.

“Q. Does Firestone have any national accounts which include sales of recapped tires?

“A. Yes.

“Q. Would they be exclusively for recapped tires or would they include recapped tires as well as new tires?

“A. There are some national accounts that would buy recapped tires. Other national accounts purchase only new tires.

“Q. These accounts which purchased recapped tires, I assume, would be served in part by various direct dealers which the company has around the country?

“A. They may be served by direct dealers or Firestone Stores, or by a combination of both.

“Q. Yes. Is there a standard price in your company for recapped tires based upon the size or grade and so forth?

1049 “A. To national accounts?

“Q. Yes.

*Testimony of E. A. Hinderscheid*

“A. There is no standard price because the price that is arrived at by negotiations between the home office and the home office of the national account would determine not only the price of new tires, but recaps as well.

The prices of recaps may vary to different national accounts just the same as the prices of new tires vary to various national accounts.

“Q. Would the price of the recapped tires be uniform with reference to your direct dealers?

“A. No.

“Q. In what way would the direct dealer determine the payment that he is to receive for servicing one of your national accounts with recapped tires?

“A. If the dealer delivered a recapped tire to a national account, and if that tire were to be billed on the home office books, that dealer would receive a merchandise credit equal to the price the dealer pays currently for the tire.

“Q. Do some of your dealers do recapping at their own establishment?

1050 “A. A minority, a very small minority of our 13,000 direct dealers.

Mr. Tincher: I believe that is all the questions I have.

**Redirect Examination,**

By Mr. Mitchell:

“Q. Just one point, I believe, Mr. Hinderscheid. In your cross-examination I know, and perhaps also earlier in your direct testimony, the term ‘fleet sale’ and ‘fleet account’ was encountered. I would ask you, sir, whether or not such a fleet account or fleet sale is included within the term ‘commercial accounts’ which appears in several places in the notations throughout your Exhibit 1?

“A. It is. We make no distinction in a commercial account sale which is, again, a consumer sale, whether the

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so-called commercial account purchases one tire or 500 tires.

"Q. And if I may, sir, in answer specifically to my question, then, the term 'commercial account' encompasses fleet accounts?

"A. Yes.

"Q. The one is a part of the other?

1051 "A. That is correct.

. . . . .

1053 **DEPOSITION OF REUBEN E. HEDLUND.**

. . . . .

**"REUBEN E. HEDLUND,**

the said witness, being duly sworn, deposes and says as follows:

**Direct Examination,**

By Mr. Mitchell:

"Q. 1. Will you state your name, please?

"A. Reuben E. Hedlund.

"Q. 2. What is your office address, please, Mr. Hedlund?

"A. 624 South Michigan Avenue, room 1000.

"Q. 3. Is that in the City of Chicago, Illinois?

"A. Yes.

"Q. 4. Are we taking this deposition in your office at that location?

"A. That is correct.

"Q. 5. Are you also a resident of Chicago or some nearby residential community?

1056 "A. I live in Chicago.

"Q. 6. Mr. Hedlund, we are taking your deposition in the case of Goldberg, Secretary of Labor, against Steepleton General Tire Company of Memphis, Tennessee,

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and Mr. Steepleton, individually, and I want to give you the frame of reference of my questions, so that you may adopt your responses accordingly.

Mr. Steepleton is engaged in the tire business as an independent dealer, handling primarily products of General Tire Company. He does not engage in business for export, nor does he engage in business directly with manufacturers of automobiles which are, I believe, called original equipment transactions in the tire industry. He does engage in business with customers in the community of Memphis, Tennessee, where his place of business is.

So that, as I indicated, whatever questions I ask you about the kind and types of tire merchandise, will be with reference to that kind of an outlet for tires.

"A. Yes, sir.

"Q. 7. Now, then, sir, would you state what positions you presently hold, please, sir?

"A. At the present time I am vice-president of 1057 Cell-O-Core Company of Akron, Ohio, I am executive secretary of the Chicago Tire Dealers Association, I am editor and publisher of 'This Week in Tires', a trade media, and I am a columnist of the trade magazine named 'TBA Marketer'.

"Q. 8. First with regard to Cell-o-Core Company, would you say, please, if it has anything to do with the tire industry?

"A. That has absolutely nothing to do with the tire industry.

"Q. 9. On the other hand, the other three occupations which you have given us with respect to the publications and with respect to the trade associations, will you state whether or not they are directly related to and concerned altogether with the tire industry?

"A. Very much directly concerned and connected with the tire industry.

*Testimony of Reuben E. Hedlund*

"Q. 10. And would you state, please, sir, if you could, I just want any sort of a general average, about what percentage of your time is devoted to these callings which are directly related with the tire industry as opposed to your status of a president of an entirely unrelated business?

"A. I would say that 25 percent of my time is used  
1058 in connection with the Chicago Tire Dealers Association, and 25 percent of it with editing and publishing 'This Week in Tires', and a very—perhaps 2 percent of my time writing my column for TBA Marketer.

"Q. 11. Now, then, would you trace and briefly describe, please, sir, your background, your experiences, your various positions in the tire industry, telling us generally when you first came in this industry, and the periods of time you spent at your different positions in it.

"A. I came into the tire industry in Akron, Ohio, in 1923, being employed by Miller Rubber Company as a time study engineer.

After two years with Miller, I went with Kelly Springfield Tire Company of Akron, for about four years as production engineer.

I then went with India Tire & Rubber Corporation for five years in sales, and when I left India I was an assistant sales manager.

I then went with Firestone Tire & Rubber Company for about seven years as district manager at Fargo, North Dakota, Minneapolis, Minnesota, Omaha, Nebraska and Chicago, Illinois.

1059 I subsequently then went with U. S. Rubber Company of New York as district manager, then division manager, and just before Pearl Harbor I was assistant sales manager of the U. S. Tire Division.

During the war I was sales manager of all military tires, airplane tires and bullet sealing tanks.



*Testimony of Reuben E. Hedlund*

I left U. S. Rubber in 1945 to go in business for myself in Chicago. Do you want me to go on from there?

“Q. 12. Yes, if you would, please, sir, just bring us on down to date.

“A. In 1946 I was hired as executive secretary of the Chicago Tire Dealers Association, which was formed in 1920, and I still function in that capacity as of today.

“Q. 13. Now, then, Mr. Hedlund, during the period of let us say since 1945, have you also been engaged as a columnist or in the editorial or publishing end of the tire industry in any way, and if so, would you outline what your early experience has been in that connection?

“A. I started about in 1947 as a columnist for the Modern Tire Dealer, published in New York City, about in 1950 as a contributing columnist to Dealer News of Washington, D. C., a publication of the National 1060 Association of Independent Tire Dealers and Retreaders, and about in '58 I became a columnist also for a publication Tyres & Accessories, and the word tires is spelt T-y-r-e-s. That is printed in London, England, and circulated in approximately forty countries.

A little over two years ago I abandoned all trade paper columns and started my own media called “This Week in Tires”.

“Q. 14. Would you describe, please, Mr. Hedlund, the nature and circulation and editorial policy and purpose of your own publication “This Week in Tires”?

“A. I don't want to appear altruistic, but I felt there was a need for somebody to do what is really an educational job in principally an independent tire dealer level, in a format consisting of basically four pages, and which I hoped could be read in ten minutes. This carries all trends, all interpretations of industrial tire policies, plus a back page editorial basically aimed to improve the profit climate of independent tire dealers.

*Testimony of Reuben E. Hedlund*

“Q. 15. Is this emphasis upon educating and keeping independent tire dealers informed as to the patterns and trends in the tire industry which you have just related serves as one of the motives of your publication called “This Week in Tires”, is this interest on your part a thing that existed before you started the publication about two years ago?

“A. This was an accumulation of some ideas, and ambition to do a better job than I sensed was being done by any other trade media, and very frankly, it was done with an altruistic non-profit idea to try and repay the tire industry, which has been very wonderful to me measured financially or any other way of trying to say what one owes in an affiliation with an industry for close to forty years.

“Q. 16. Has this interest in an emphasis on your part upon education and indoctrination of people in the tire retailing business, taken any other forms, and by that I refer to trading programs, seminars, or anything of that sort, in past years?

“A. I think I could answer that question this way, that as I grew up with thousands of independent tire dealers, I recognized that many of them had very limited education, and as they were about to retire or passed away, that the heritage of their sons could be carried on through what I still call education, to make them better business men. And mainly to preserve their identity as a typical small American business man.

“Q. 17. Would you tell us what you did about your interest in having the sons of the elder tire dealers indoctrinated or taught in the ways of the typical small business man?

“A. This is a little bit embarrassing, but I went to the Akron University and talked to Dr. Warren Lee, who

*Testimony of Reuben E. Hedlund*

suggested that we start a management course primarily for independent dealers' sons.

This pattern or course was kept going for about four years, and was then emulated by the National Tire Dealers Association, plus the fact that certain tire suppliers thought it expedient to set up similar educational courses for their own dealers' sons.

"Q. 18. Do you know whether or not these same sort of courses continue to be taught? I mean periodically.

"A. To the best of my knowledge the National Tire Dealers Association still run them in Georgia, California, and it just so happens this week that there is one being run at Las Vegas, Nevada. This particular management seminar was previously held in Florida.

1063 "Q. 19. During your long years of experience in writing for the tire industry and trade publications in the tire industry, have you on occasion been asked to appear as a speaker on forums that were for members of tire industry associations, or for the general public, or in any capacity as a speaker?

"A. This is getting a little embarrassing, but I have talked to the TBA group of the oil industry at their annual conference in St. Louis.

"Q. 20. May I interrupt one moment, sir. Would you explain what 'TBA' is, sir? We are not all familiar with it.

"A. That is the tire, battery, accessory group.

"Q. 21. Would you proceed?

"A. I talked annually to the California State Tire Dealers Convention. I talked occasionally to the Canadian Tire Dealers Conference. I have talked to the International Tire Dealers & Retreaders meeting in London. I have been master of ceremonies of the Louisville Retreaders Conference group at Louisville, Kentucky. I have talked to local tire dealers associations in Minneapolis.

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Milwaukee, Pittsburgh, and several other cities whose names escape me at the moment.

1064 "Q. 22. I believe you indicated, Mr. Hedlund, that you took the role and position of executive secretary of the Chicago Tire Dealers Association in 1946, and that you continue to hold that position at the present time. Would you state, please, Mr. Hedlund, in a general and reasonably brief outline, what the Chicago Tire Dealers Association is, who its members are, the characteristics of its policies and programs, and in summary just tell us something about the organization.

"A. This is America's oldest local tire dealer association. In fact, I think it precedes the National Tire Dealers Association by one year, being formed in 1920.

I had run the Chicago District Office for both Firestone and U. S. Rubber, and the executive committee of the association came to me and asked if I would be interested in heading up their local association.

We worked strictly in a climate on a non-profit basis, trying to handle amicably our union problems and opportunities. We try to become better acquainted, and I believe basically we function just like any other association does in connection with its membership.

1065 "Q. 23. I have noticed that in your reference to the National Tire Dealers Association you have sometimes used the phrase 'independent' and I see that the word 'independent' is not in your own Chicago Trade Association's name. Would you state whether or not the membership of the Chicago Trade Association is restricted to independent dealers or does it encompass something more than independent dealers?

"A. No. We have—and this was my idea back in '46—have a current membership of approximately sixty independent tire dealers and about twenty-five company owned stores. And as a matter of interest, our board of directors

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consist of thirteen, nine are independent tire dealers and four are so-called company owned store managers.

“Q. 24. And when you use the phrase ‘company owned stores’, Mr. Hedlund, am I correct in construing that you mean stores that are operated or are controlled by one of the tire manufacturers, for example, the Firestone firm or the Goodyear firm?”

“A. This is correct. Firestone, Goodyear, Goodrich, General and U. S. have company owned store operations in Chicago.

“Q. 25. At my request, Mr. Hedlund, you have given me a piece of stationery showing the letterhead of, I believe, the present executives and board of directors of your Chicago Tire Dealers Association, and I will ask you to identify that, if my description of it is correct, and make that Exhibit 1 of your deposition.

1066 “A. This is correct as our current executive committee and board of directors.

Mr. Mitchell: And if you will, please, mark that as Exhibit 1.

(Whereupon said document was marked Exhibit 1—Hedlund Deposition.)

By Mr. Mitchell:

“Q. 26. I notice at the very bottom of the Chicago Tire Dealers Association stationery there are affiliations shown, one of which is abbreviated ‘NTDRA—Washington, D. C.’ Would you for clarification, Mr. Hedlund, explain what those initials stand for?”

“A. Let me say that not every member of the Chicago Tire Dealers Association is affiliated with the National Tire Dealers Association, but possibly 70 percent do. We have no direct connection, we are strictly independent, however, many of my members are long time members of National. In fact, my secretary-treasurer, Mr. Sam Duxler, is the Northern Illinois director of the National Tire

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Dealers, and is currently on the National's executive committee.

"Q. 27. Thank you sir. My question, however, and 1067 I believe perhaps I can interpret it, am I correct in thinking that the initials 'NTDRA' which appear in the lower left-hand corner of your Exhibit 1, stand for 'National Tire Dealers & Retreaders Association'?"

"A. That is correct.

"Q. 28. And that is the organization——

"A. National.

"Q. 29. ——which you refer to as 'National'?"

"A. As the National.

"Q. 30. Yes. Does your Chicago Trade Association take any interest in or seek to inform its members about legislation on the level of the State of Illinois, or perhaps the City of Chicago, which might or could pertain to or affect such members?"

"A. We are very vitally interested in any local legislation, and particularly the legislation that comes out of the Capitol at Springfield, Illinois, and I work very closely with a Mr. Charles Barker, who is the Illinois State Tire Dealers Association's executive secretary.

"Q. 31. By reference to your long experience and varied background in the industry, and by reason of the affiliation of your Chicago Association with the National 1068 Association could you state whether or not that National Association performs the same or similar functions with regard to laws and legislative trends on the national level that your own association performs on the state or local level?"

"A. I can say from observation that the National is very alert, very active in connection with any legislation that might have its impact at independent tire dealer levels. It performed admirably in that respect.

"Q. 32. Mr. Hedlund, would you state, please, sir, how

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sales are classified in the tire industry and specifically by tire dealers, with regard to whether or not sales may be retail or wholesale sales?

"A. In my estimation there is only two classifications, the two that you mention, either retail or wholesale, or in some independent dealers you might have a smattering of both.

"Q. 33. Would you state, please, sir, what sales are classified first as sales which are wholesale?

"A. Personally, and I think I speak for a lot of people, a wholesale does not go direct to the consumer or customer.

"Q. 34. Where does a wholesale sale go, sir?

"A. The wholesale functions, at least in our industry, as a middle man between the manufacturer and the dealer. He stocks and sells merchandise to the dealer who, in turn, is the one who sells it to the ultimate customer.

"Q. 35. All right, sir. Is what you have just said with regard to what constitutes a wholesale sale in your opinion, the recognition of a wholesale sale in the tire industry?

"A. As far as I know, this is the identity of a wholesale sale in the tire industry.

"Q. 36. Now, then, if you would, please, Mr. Hedlund, tell us what is a retail sale in the tire industry.

"A. I think this is a very simple answer to your question. A retail sale is where you sell something direct to the consumer or customer, despite what category he may be classified in due to any descriptive verbiage that has been used to try to classify retail sales.

"Q. 37. Am I correct in construing your answer to be that any sale to the ultimate consumer is then a retail sale according to the recognition in the tire industry?

"A. Yes. Let me clarify that a little bit. This is a



*Testimony of Reuben E. Hedlund*

sale to the automobile owner, this is a sale to a truck owner or a person who might own a fleet of trucks, this is a sale to anyone where the tire eventually goes right on the wheel.

1070 "Q. 38. Would you please state, Mr. Hedlund, what is recognized in the tire industry as a retail establishment?

"A. Well, I think an answer to this question is anybody that is after retail sales is a retail establishment, where he is trying to do business direct with his customer.

"Q. 39. Now, then, I would like to review with you certain regulations or directives which emanate from the United States Department of Labor, and I am going to read from or refer to a bulletin or pamphlet which is entitled 'Part 779—The Fair Labor Standards Act as Applied to Retailers of Goods or Services,' and which also indicates parenthetically that it is a reprint from the Federal Register dated September 2, 1961, and the particular bulletin or pamphlet to which I refer and have just described, is marked Exhibit 1a to the deposition of Micklish, which has heretofore been taken in this case, and I will particularly direct my questions to that part of this exhibit Section 779.372, and following sections which appear on page 8363 of said exhibit."

And in support of the material in this exhibit at the place indicated, I will ask you to read with me certain sections of it which purport to classify certain categories

or types of sales of tires for vehicles in particular  
1071 ways, and I refer particularly to sub-paragraph (b)

under Section 779.373, which states generally that sales made pursuant to a formal invitation to bid, and illustrates sales made pursuant to bids as being those typically made to the federal, state or local governments. And this bulletin classifies such sales as not being retail sales according to the recognition in the industry.



*Testimony of Reuben E. Hedlund*

My question is whether or not in your opinion the tire industry recognizes sales to governmental agencies made pursuant to bids as retail sales or as wholesale sales.

“A. Right here in Chicago we have many independent dealers that bid and secure local and state government business particularly, and we consider this as a retail sale.

“Q. 40. Is that in accordance with your understanding of the recognition throughout the tire industry with respect to such transactions?

“A. I would say that this is the broad, defined description of sales in these categories, that it is understood as a retail sale.

“Q. 41. Now, then, moving on to sub-paragraph (c) under the same section which refers to the so-called ‘national accounts’ which are, for the purposes of my question defined as follows:

1072 ‘Sales where delivery is made by the local tire dealer under a centralized pricing arrangement between the customer’s national office and the tire manufacturer; payment may be made either to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer’s national office.’

Now, then, taking that transaction there described as a national account transaction, Mr. Hedlund, would you state whether or not as recognized in the industry, such a transaction is a retail sale of a wholesale sale?

“A. We have always identified sales to so-called national account category customers, as a retail sale.

“Q. 42. Moving now, then, to sub-paragraph (d) of this same section which has reference to sales to fleet accounts at wholesale prices and I want, with respect to my question, for you to accept no part of this paragraph (d) as to which you find any variance between it and industrial practices, and would you tell me, please, sir, whether or

*Testimony of Reuben E. Hedlund*

not sales to fleet accounts at wholesale or any other prices, are recognized in the industry as retail or wholesale transactions.

1073 "A. Sales to fleet accounts, irrespective of size, are strictly recognized as a retail sale.

"Q. 43. If you would pay attention to the body of sub-paragraph (d), reference is made to certain wholesale prices and comparisons between certain prices for passenger car tires for resale, and truck tires for resale; reference is further made to accounts which operate more than ten commercial vehicles; and my question is, sir, whether or not the observance of certain distinctions between prices at which the product moves, or certain distinctions based upon the number of vehicles operated by the purchaser, have any relevance or significance in the practices of the tire industry as you know them.

"A. Any sale to any fleet account, and we sometimes call them commercial accounts, common carriers, and so forth, are strictly retail sales by dealers.

"Q. 44. Moving on now to sub-paragraph (e) of the same section, which refers to sales on a tire rental service on a mileage basis known in the trade as 'mileage contracts', which is further there described as a leasing arrangement. My first question with regard to that sub-paragraph, Mr. Hedlund, is whether or not according to your knowledge and experience this kind of a  
1074 mileage contract is a common or a rare type of transaction for the typical tire dealer.

"A. Mileage contracts are a rarity at dealer levels, and I only know of one small one right here in Chicago. And the dealer who handles it, incidentally, certainly classifies it as a retail sale.

"Q. 45. Is the classifications by that dealer in that instance of this mileage contract arrangement as a retail transaction, will you state, please, sir, is that in accord with the recognition in the industry as you know it?

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"A. Yes. I think any time a dealer has a mileage contract, or what we also know as a cost per mile or rental contract, that this is always recognized as a retail sale.

"Q. 46. With reference to sub-paragraph (f) of the same section of this exhibit, which refers to:

'Sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price'.

1075 And in context that sale of services or repair work is classed by this bulletin to be wholesale, that is, non-retail business. My question is, would that kind of service or repair work be recognized in the tire industry as retail or wholesale business?

"A. This type of work and service is still strictly a retail sale according to common practice.

"Q. 47. The phrase is used in the same sub-paragraph (f) 'the prevailing retail price'. I will ask you Mr. Hedlund, based upon your knowledge and experience in the marketing and merchandising of tires, what if anything the phrase 'prevailing retail price' connotes as applied to the tire industry?

"A. I don't want to be facetious, but there is no such a thing as a going retail price.

"Q. 48. Now, then, moving on in the same exhibit and on the same page before referred to, to Section 779.375, if you would look, sir, you will find the statement:

'An establishment engaged in the retreading and recapping of tires is recognized as a retail establishment in the industry if it does not derive from the sale of tires retreaded or recapped for sale, more than 50  
1076 percent of the annual dollar volume of its sales resulting from its retreading or recapping operations'.

*Testimony of Reuben E. Hedlund*

My question, Mr. Hedlund, with reference to that language, is whether or not this break-off point at 50 percent is in fact recognized in the tire industry as a determinative criteria to identify or segregate retail establishments from non-retail establishments, or from any other category.

"A. This is the first time that I have ever seen any percentage used with what we call a retreader, and there are approximately ten thousand in America. A retreader sells and services retread tires, and again this is strictly a retail classification. It is a retail sale.

"Q. 49. I believe I understood your answer to be that the 50 percent level mentioned in that part of the bulletin from which I have just read, does not to your knowledge have any significance in the industry.

"A. None at all.

"Q. 50. Mr. Hedlund, as a matter of fact I am sure you know that the bulletins and regulations from which I have read and to which I have just referred in the last several questions, came out in approximately the 1077 same form as those from which I read and have been of record now for, well, let's say in round figures two years or more. And my inquiry is directed to what, if anything, your local Chicago Tire Dealers Association or some of its individual members may have done when such regulations and directives were first brought to its or their attention, and if they did nothing, why did they fail to do anything about these regulations?

"A. I think my answer is very simple. Virtually every employee, outside of sales and office employees, belong to unions in Chicago. And this has been true for possibly twenty-five years. Our basic hourly rates, just as a matter of interest, currently at the lowest level are over \$2.00 per hour. Therefore, we do not get too excited about wage regulations, in view of the fact that we are in what you might call a rather high labor base rate area.

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“Q. 51. From your fairly extensive travels to appear before tire retailer associations in various parts of the country, could you tell us, Mr. Hedlund, whether or not there are other areas in addition to Chicago where the labor market or situation is such that the minimum pay for employees in such areas exceeds the minimum pay as enacted by the wage and hour legislation?

1078 “A. If I understand the question correctly, taking California as an example, are they confronted with this minimum wage—

“Q. 52. Will you answer my question first?

“A. —problem.

“Q. 53. Yes. My question first is, whether or not from your travels and appearances before tire dealer organizations in several parts of the country, are you familiar with the going wage rates in such different parts?

“A. Let me say this, that I exchange wage rates with association secretaries across the country, and I notice that when I look at them, particularly geographically below the Mason-Dixon line, that they are much lower than ours here in Chicago, or those in California.

“Q. 54. Well, did you perhaps intend to refer to this Mason-Dixon Line, with which we are all familiar, as being a sort of a dividing line between the higher and lower wage rate areas?

“A. I think this is basically the way we in the industry think. Having traveled in those areas, we sometimes envy the labor rates that some dealers pay. However, we are realists who know that geography plays a big  
1079 part in labor rates, not only in our industry but in many other industries.

“Q. 55. Could you tell us, sir, whether or not a comparison could be made on this basis, that north of the Mason-Dixon Line, and from what you said I take it also on the West Coast, the going wage rate for labor, unskilled type

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labor, exceeds the minimum as set by federal legislation, whereas south of the Mason-Dixon Line it may not exceed the minimum set by federal legislation?

"A. That would be my observation, that as we go into the south that we notice that those labor rates are lower than we who live up north pay our skilled or unskilled labor.

. . . . .

1080 By Mr. Mitchell:

"Q. 58. I presume, Mr. Hedlund, that in that by-play you may have lost track of the question. It would be understandable if you did. My question was directed, sir, to the geographic spread of unionization or organization into labor unions of tire dealer employees on a geographic basis, if such basis exists in fact, and I would like to know what that geographic basis is.

"A. I might say this, as I travel through the so-called southern states of Alabama, Mississippi, Tennessee, Georgia and Florida, I can't recall hardly a single instance where the employees of the independent dealers were union members. I could be wrong with that observation, but this is an honest statement.

1081 "Q. 59. Now, what has been your experience with regard to the employees of the tire dealers in other parts of the country? You have already indicated that there has been organization of such employees in the Chicago area for many years. Have you encountered it generally in other areas than those you just named which encompass part of the southeast of the United States?

"A. Yes. Employees of Cleveland tire dealers, Minneapolis, Los Angeles, San Francisco and in Denver, to the best of my knowledge, are completely organized in the unions.

"Q. 60. From whatever exchange of information there may be between yourself and persons of corresponding

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responsibility in tire dealer associations in other parts of the country, or from your observations or discussions during your travel to other parts of the country, can you tell us, Mr. Hedlund, whether or not as a general thing the bargaining agreements struck by union representatives of tire dealer employees, where such employees are organized, exceeds or is less than the wage rates set by the federal labor legislation?

“A. They are far beyond the wage rates set by the government.

“Q. 61. May I interpolate to construe ‘beyond’ as being in excess of or greater than?

1082 “A. In excess of. In fact, almost double.

“Q. 62. What, if anything, do you know with regard to the additional records that must be kept by employers with regard to its employees where there is a unionization or organization of those employees, and my question, of course, has specific reference to the tire dealer employer.

“A. Every dealer, particularly where he has union help, has time clocks or cards that are signed, and very accurate records are kept on every employee, particularly due to penalties that we might incur by not paying for overtime, or any violation of our union agreements.

\* \* \* \* \*

**Cross-Examination,**

By Mr. Tincher:

\* \* \* \* \*

1095 “Q. 48. I take it, Mr. Hedlund, that in your asso-  
1096 ciation with the tire industry, and your position as editor of ‘This Week in Tires’, you also have access from time to time to published price lists put out by General Tire & Rubber Company, is that correct?

“A. In other words, if I want to go out and get a General Tire & Rubber Company price list, that I could



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go say to a General dealer, or a General store, and they would give it to me.

"Q. 49. Is that true?

"A. This is true, I think that they would.

"Q. 50. And have you in recent months seen or examined any of the prices published by General Tire & Rubber Company?

"A. To be very honest, I don't think in the fifteen years that I have run this association, that I have ever had a General Tire Company price list in my files.

"Q. 51. I believe you have already stated, perhaps for the record but let me ask you, are you in any way acquainted with the Steepleton Tire & Rubber Company of Memphis?

"A. To the best of my knowledge I wouldn't know Mr. Steepleton if I saw him. Now, he may know me, as I said previously. I have not been in Memphis I don't think since World War II.

1097 "Q. 52. You are not acquainted with his operation there?

"A. I have no idea of his operation.

"Q. 53. Are you familiar with the price structures and other problems, operational problems of the tire dealers around the country?

"A. What do you mean, price structures?

"Q. 54. The prices at which they sell their products.

"A. I don't think there is a person living that would know what dealers sell at. I mean, there is no uniform price in the tire industry.

"Q. 55. Well, would you say that the price level published here in your weekly publication and set forth on Exhibit 2 to your deposition, is that representative of the prices that are in use at the present time?

"A. Well, this is in an area that is perhaps basically used in what we call 110 level tire, a first line 100 level tire, second line tire and third line tire.



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“Q. 56. The published prices then are comparable, with reference to the different manufacturers who put out tires that fall into these categories, are they not?

“A. Well, they used to be comparable, but since November 1st and January 1st, there is a great area of 1098 difference between all of these, both list prices, code prices and so forth.

“Q. 57. My questions then will relate to the period prior to November, 1961. Specifically, I should like to have you think in terms of prices during the year 1960. Now, from your acquaintance with the industry, were the published prices generally pretty much the same for different manufacturers?

“A. From a list price standpoint they were pretty much the same, depending now again on let us call it the equipment type of manufacturer and the non-equipment type of manufacturer.

“Q. 58. Yes. And General Tire & Rubber Company, for example, was an equipment type of manufacturer, was it not?

“A. Yes. But let me add this. I think this is news worthy, or at least of interest. The General Tire & Rubber Company had list prices and dealer costs, and so forth, higher than the average tire supplier.

“Q. 59. Well, it is the smallest of the Big 4, as I understand it, is that correct?

“A. You are right up to date because they just passed Goodrich this year, number 4 in total dollar annual sales.

“Q. 60. Well, in 1960 would they have been fifth?

1099 “A. Fifth in 1960, but they went into fourth position, I understand, in '61.

“Q. 61. In your earlier testimony you classified sales in only two separate categories, namely, retail sales and wholesale sales. I want to question you briefly in regard to

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the wholesale classification. Would you explain again what you call the wholesale classification of tire sales?

"A. In the tire industry, the wholesaler sells to a dealer.

"Q. 62. And I believe you said that there is a middle-man.

"A. That's what he is.

"Q. 63. Normally involved in a wholesale sale.

"A. This is what we ordinarily call a middle man, between the tire supplier and tire dealer. He is right in there in the middle called the wholesaler.

"Q. 64. Is that middle man in the tire industry normally independent of the manufacturer?

"A. I would say so.

"Q. 65. Does he normally have a large warehouse where he carries a sizeable stock of tires and other products which he sells to dealers?

"A. He generally is in a location that is not conducive to retail business. He is in the type of a building  
1100 that we might call a warehouse facility for stocking merchandise.

"Q. 66. Are you familiar with the sales organization generally of the General Tire & Rubber Company, Mr. Hedlund?

"A. Well, now, are we talking about personnel, dealer stores, or what are you talking about?

"Q. 67. Well, my question relates to their organization setup for the distribution of tires.

"A. To the best of my knowledge General sells strictly to dealers, and they also have, and I could be a little bit wrong, about a hundred company owned stores of their own.

"Q. 68. Now, what I wanted to develop a little more clearly is the role of the so-called middle man in the General Tire & Rubber Company organization.

"A. Well, there may be certain parts of the country

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that they might have a wholesaler that perhaps covers a county or two. This could well be, but I am not that intimately acquainted with their system of marketing or distribution.

“Q. 69. Are you aware that General Tire & Rubber Company makes sales directly to many of their customers?

“A. I am very conscious that not only does General do that, but just about every tire supplier in the industry.

“Q. 70. Among those customers are various vehicle manufacturers to whom General Tire & Rubber Company sells?

“A. That is what we would call original equipment.

“Q. 71. Yes.

“A. So-called, the Detroit category.

“Q. 72. Yes. And in addition to the original equipment tire customer, are you aware that General Tire & Rubber Company also sells in sizeable volume to so-called national account?

“A. This is a good assumption that they do, not only to national accounts, but to what we call common carriers, and so forth.

“Q. 73. Yes. And you are sufficiently acquainted with the industry to know that not only General Tire & Rubber Company, but the other manufacturers have a sizeable volume of this type of business.

“A. This is what we call direct selling, and this is a little bit of a bone of contention of the so-called independent tire dealer.

“Q. 74. Yes.

“A. He thought that this was his province, that he developed it, serviced it, and now he is circumvented occasionally by what he terms direct sales.

1102 “Q. 75. With reference to that type of sale and the other sales directly by the manufacturer, is there any place in this phase of the business for a middle man?

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"A. Now you are going to ask a question to which I have to give you a personal answer, that the challenge in America today is to take the tire, or any product, and in the least amount of steps go from the shipping room platform directly onto the customer's wheels. These stop gaps, the wholesalers, the dealers, and so forth, is trying—there is an ambition to keep at least the wholesaler at a minimum, because he is going to always have to be reimbursed a certain percent for his inventories, his work, and so forth.

"Q. 76. Would it be correct to say then that the trend is away from the wholesaler and middle man step in the marketing of tires?

"A. I would say so, and then again I could be wrong, but this would be my observation.

"Q. 77. Is there any trade organization that you know about that is now active on behalf of the wholesaler and middle man group?

"A. Let me say this, I will go back to the so-called— or to the tire industry again. There are these so-called wholesalers still out there who sell and service what we call oil company stations, associate dealers, and so forth. There is still a percentage of them in America.

Now, to answer your other question, there is an association called the Automotive Wholesalers, I believe, and they are in more or less automotive parts piston rings, spark plugs, batteries, and so forth.

"Q. 78. Is there a comparable organization in the tire industry?

"A. I know of none that carry that identity.

"Q. 79. For comparison purposes, could you fill us in a little bit on the place in the automotive industry which is held by these wholesalers of automotive parts with reference to the distribution of tires?

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“A. You say is there anything in the automobile industry?

“Q. 80. Automotive parts industry.

“A. There is automotive wholesalers.

“Q. 81. Yes?

“A. They are out there yet. Now, what was your question?

“Q. 82. Is there a comparable group in the tire industry, and if so—

“A. There are individuals and companies and what have you that are still in this wholesale category in the tire business.

1104 “Q. 83. With reference to the automotive parts industry, wouldn't it be true that in addition to supplying parts and replacement of parts to garages and dealers, that they supply automotive parts to fleet operators of trucks and automobiles?

“A. Now, I don't know enough about the so-called automotive wholesaler to give you an intelligent answer.

“Q. 84. Well, I suppose you are aware that many of the fleet operators of vehicles maintain their own repair garages, and as a part of those repair operations they would be buying replacement parts for motors and gears and various other parts of the operating mechanism, is that correct?

“A. That is correct.

“Q. 85. And my question then is, are you aware that such fleet operators are able to buy and do buy at wholesale prices from the automotive parts wholesalers?

“A. Again I have to plead a little ignorance, because I have not followed the so-called automotive wholesaler. My interest has always been strictly in the tire industry and TBA, and these other suppliers had no defined interest outside of casual.

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“Q. 86. Well, as, of course, being experienced in  
1105 the transportation industry, would you classify  
sales of automotive replacement parts, for example  
to fleet operators, at prices which are the same as the  
prices to a garage, for a piece of equipment to be used  
on some individuals automobile, where those prices are  
the same, would you classify the sale to the fleet operator  
as a retail sale or a wholesale sale?

“A. I still go back on a rule of thumb, or whatever you  
want to call it, that if somebody is selling something to  
a consumer or user, that that is a retail sale. You see,  
there is a lot of verbiage in every industry that has been  
carried along, wholesale and different things, that is very  
misleading, believe me.

“Q. 87. If the sale of automotive parts is made at a  
price comparable to that to a dealer and in quantities  
which are comparable to the sales of the dealer, would  
you, nevertheless, classify that as a retail sale?

“A. I still say that in America, where you sell some-  
thing direct to the ultimate consumer customer, that that  
is a retail sale. And you are getting me in areas that I  
am not equipped to give you too intelligent answers,  
1106 when you talk about automotive parts and things  
like that, because I immediately think of piston  
rings, spark plugs, equipment, and so forth.

“Q. 88. If I understood you correctly, you testified ear-  
lier that where the purchaser puts a tire he buys onto the  
wheel of a vehicle he owns, you consider that to have  
been a retail sale. Is that correct or not?

“A. You mean, say I drive a car into a dealer and buy  
a tire and it is put on my car, if that is a retail sale?

“Q. 89. No. My understanding of your testimony was  
not that restrictive. Perhaps I misunderstood, but I  
gathered that you were saying that if the tire is sold, one  
tire or any number of tires to a person who puts the tires

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on vehicles which he owns, that is considered in your judgment a retail sale.

“A. That’s right.

Mr. Mitchell: May I interrupt? For clarification I think the record should reflect, are you distinguishing in that question between the purchaser putting the tire on the vehicle as compared to the seller putting the tire on the same vehicle?

Mr. Tinch: There was no such distinction.

Mr. Mitchell: I wanted to be sure. I thought  
1107 it might have been read into the question, and that is why I sought the clarification.

By Mr. Tinch:

“Q. 90. Then I want to ask you, Mr. Hedlund, would you make the same answer notwithstanding the fact that this purchaser of a number of tires is using the tires on vehicles which he intends to sell, specifically, for example, a used car dealer. Would that be a retail sale to that used car dealer?

“A. If the tire dealer sold a used car dealer a set of tires for his used car, this in my opinion is a retail sale.

“Q. 91. Now, Mr. Hedlund, with reference to the interpretative bulletin about which Mr. Mitchell asked you some questions, did you participate in any way in presenting material and arguments to the Department of Labor when this bulletin was being compiled?

“A. They never asked me for any information, I never received a questionnaire, or anything.

“Q. 92. Are you in any way familiar with the material which was submitted by the tire manufacturers and by the National Tire Dealers & Retreaders Association?

“A. No, I am not.

1108 “Q. 93. In response to Mr. Mitchell’s question you stated that sales made pursuant to a formal invi-

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tation to bid, sales to the state and local governmental units, would nevertheless be, in your opinion, retail sales.

"A. That's right.

"Q. 94. Are you familiar with the practice in the industry of various states publishing a state list price which the manufacturers then use in having their dealers make sales to state agencies?

"A. I am under the impression, I have not seen it for years, but it could exist, that there was so-called state government prices or local government prices. But again I could be—this is an area that I very seldom have any sort of intimate contact with. I do know that dealers, for instance here, will bid on the parts industry.

"Q. 95. Have you seen lists which are published by the tire manufacturers or by dealers which are termed state list prices?

"A. I have not seen one I don't think in fifteen years.

"Q. 96. Have you heard the term used?

"A. I have heard the term, but I have never seen the price list. I was not too much interested.

1109 "Q. 97. Yes. In the connection with which you have heard the term 'state list prices' would you classify that category as being comparable to the prices that are published or at which the tires are sold where an invitation to bid is issued by the State government, are those prices comparable? Would you consider them in the same category? Maybe I can make it a little more clear by saying, where the state requests tire manufacturers or dealers to submit bids—

"A. Right.

"Q. 98. —for tires of certain specifications, if a state list is published then the tire dealers have the option of selling the tires to the state agencies at that list price, would you consider the transactions essentially the same?

"A. You mean a retail transaction?



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"Q. 99. Without reference to whether it is retail or non-retail, would you consider the transaction essentially the same where the sale is made pursuant to an invitation to bid, or whether it is made pursuant to a published state list price?

"A. Well, all I know is that local and county and 1110 state governments will ask for bids on their tire requirements. Some tire companies will bid direct, sometimes dealers bid, and I never slowed down to see what they used as a basis for submitting their prices.

"Q. 100. All right. You also indicated that you consider sales to national accounts as retail sales. I assume that is because the purchaser is using the tires on his own equipment.

"A. Correct.

"Q. 101. I was hoping you would make a statement, because the reporter cannot get your nods. 1

"A. Oh. That is correct.

"Q. 102. Are you familiar with the procedure by which these national accounts are serviced by the various independent dealers across the country?

"A. I won't say I would be accurate. Some of them solicit bills, service, and handle the national account on their own. Sometimes perhaps they are asked to deliver and service a tire, and maybe the supplying tire company does the billing.

"Q. 103. Yes.

"A. And they are reimbursed in some form or fashion.

1111 "Q. 104. In your experience, then, the procedure is not uniform?

"A. No. There is a great variation in the handling of national accounts today.

"Q. 105. Take the situation where a manufacturer has a national account arrangement with a company such as

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the Continental Baking Company, and in a particular locality the Continental Baking Company manager arranges to have the local dealer deliver a group of tires to him. There has been no prior purchase of that particular group of tires, only an arrangement whereby they will be furnished at a certain price.

Now, are you familiar with the procedure followed sufficiently that you can give your opinion as to where the sale of that group of tires is made and completed?

Mr. Mitchell: We, of course, will object to that both as to form and substance, and at least the objection as to form is pertinent and proper at this time.

Mr. Tinch: You may go ahead and answer now that counsel has noted his objection.

Mr. Mitchell: Under the rules by which these depositions are taken, where I make my objection as to form and Mr. Tinch does not choose to restate, you are subjected to answer.

The Witness: National account sales are solicited by men known as being in the national account department of tire companies, as a rule.

By Mr. Tinch:

"Q. 104. Yes?

"A. They go out and solicit the business and quote prices. I don't know if contracts are written. And where and if necessary they need dealer stores or what have you to service this national account, they are notified to that effect.

"Q. 105. Yes. But you are aware, of course, that the arrangement between the manufacturer and the customer is simply one whereby the customer says, 'I will from time to time need tires in various places around the country where we have branch operations.'

"A. That's right.

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“Q. 106. At that point, certainly, you will agree that there has been no sale of any particular tire.

Mr. Mitchell: We object to that question on the same grounds.

1113 By Mr. Tinch:er:

“Q. 107. You may proceed to answer.

“A. That there is no sale yet until the tire is delivered and serviced and mounted and then billed?

“Q. 108. My specific question was, you would agree that there has been no sale at that point?

“A. Without the delivery of the tire?

“Q. 109. Yes.

“A. That's right. No sale. Maybe a commitment, but there is no actual sale.

“Q. 110. Presumably under the circumstances I have just stated, the purchaser has not obligated himself to buy any specific quantity of tires, or perhaps any tires at all. Would you agree on that?

“A. Now you are getting into an area that I don't know too much about. What do the national account sales manager and their sales force, what do they say, what are the understandings of contracts, and so forth, this is a little bit far removed from any current knowledge of mine.

“Q. 111. In your experience, and we will not limit it to your current knowledge, Mr. Hedlund, but in your  
1114 experience as division manager and assistant sales manager for the U. S. Rubber Company, for example, did you have any dealings with the national accounts served by that company?

“A. Now you are going way back to 1940, and I presume because the descriptive verbiage of national accounts has been in the industry I think from the day I stepped into it in 1923. I again could be a little bit wrong on the date and the year on that.

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"Q. 112. Well, you did have a position as assistant sales manager during World War II, did you not?

"A. Yes, but this was on military tires.

"Q. 113. And military aircraft?

"A. Yes.

"Q. 114. Just incidentally, were those considered to be retail sales when you were selling to the government as the consumer? On the tires.

"A. Now, let me say this. During the war times, and you will recall we were out of tires, we were out of crude rubber, dealers were selling retreads made out of ersatz material. So this would strictly be a direct sale by a tire company to a government agency during the war. I don't think, unless there were real exceptions, that you would put that into a retail category at that time.

1115 "Q. 115. Would it be different now? I assume that tire manufacturers are still selling automobile tires and airplane tires to government agencies.

"A. That's right.

"Q. 116. How do you classify such sales today?

"A. It is a direct sale to a tire company.

"Q. 117. To a consumer, the United States government.

"A. I think you have to finally put Uncle Sam in a little separate category, and not really call him a consumer.

"Q. 118. Would you have a different category for sales to the federal government than you have for sales to state government?

"A. A little bit, I think. And again I may be a little bit hazy now on what constitutes a sale to the federal government. But I do know that a sale to the State of Illinois, if a dealer handles it, this could well be a retail sale.

"Q. 119. Is it considered a retail sale in the industry?

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“A. When a dealer handles it, it is. I mean, there is no other category that is logical where it would fall.

“Q. 120. You are aware that independent tire dealers do supply tires to agencies of the United States 1116 Government too, are you not?

“A. Well, what type of agencies? Like——

“Q. 121. General Service Administration, Post-office Department, United States Marine Corps.

“A. Yes, this could well be, particularly in the retreads this happens, by independent dealers.

“Q. 122. And new tires too?

“A. It could be.

“Q. 123. And my question is, in your opinion, in the field of tire marketing, are such sales retail sales or wholesale sales, or some other category?

“A. Well, I would rather say that this now comes into a category that really, to be very factual, is neither a retail sale nor a wholesale sale. Maybe we ought to call this now a sale to the government agency.

“Q. 124. Then if we do make a third category which you term sales to a government agency, would you place only sales to the United States government in that category, or would you also include sales to state governments, sales to city governments and sales to county governments?

“A. I would confine that strictly to the government, because when you are selling to local or state gov- 1117 ernments, sometimes there is a lot of not only the sale and delivery, but there is mounting, and so forth, and I think somewhere there has to be a little cleavage in the classification.

“Q. 125. Then you would limit that category to sales to the federal government?

“A. I would. This is strictly personal.

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"Q. 126. I want your opinion as an expert, Mr. Hedlund.

"A. Yes. Thank you.

"Q. 127. You spoke of classification of sales which you termed commercial sales. Would you elaborate on that just a little bit?

"A. Yes. Commercial, in the early days of the industry, everybody that had a truck, one, two, three, four, five or a fleet of them, was called a commercial account. This was sort of called commercial account selling. And again this was basically truck tires contrasted to passenger tires, as of the average car owner.

"Q. 128. Yes.

"A. But still a retail sale in my book.

"Q. 129. These commercial accounts expected to buy at prices lower than were charged to the general public, did they?

"A. Well, this is America, this is if you buy more of something you are supposed to get a better price.  
1118 This is a theory that has sort of gone hand in hand with selling to so-called commercial accounts.

"Q. 130. And the practice grew up in the industry, I believe, to give them a greater discount from the list price than the average person would be able to get?

"A. This is true. I mean, this makes a little bit of sense, because on the one hand you may be dealing with a \$20.00 unit tire sale to the car owner, and take a ten or a twenty on the truck is a \$100.00 unit sale.

"Q. 131. Yes. So on the list price for the \$100.00 unit sale, particularly if it was a fleet account, a greater discount would normally be given than would be given to the individual buying automobile tires.

"A. This became a sort of accepted practice of custom.

"Q. 132. And that practice was had, was it not, with reference to fleet owners of trucks as distinguished from

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an individual owner of one truck, even though the size and type of tire would be the same in either instance?

"A. Yes. This is an unfortunate thing that the size of the fleet determined the better price. And we call fleets, some call them ten or more trucks, some 1119 might call them fifty or more, or a hundred or more.

"Q. 133. Did the practice develop that the fleet account would be applied even to the five or more vehicles?

"A. Here in America it went down to one. Sometimes a fellow with one truck could buy truck tires just as cheap as the fellow who had ten or twenty or fifty.

"Q. 134. But that would have been the exception to the rule?

"A. This would be the exception.

"Q. 135. And the fleet practice of selling at greater discounts to the owners of five or more vehicles spread to the passenger tire sales as well as the truck tire sales, did it not?

"A. No, I wouldn't agree with that statement. The only thing that we did at so-called passenger car level, we bought two tires instead of one, or bought four instead of one, or four instead of two, you got a little better unit price than when you bought them singly.

"Q. 136. Yes, but what I had reference to was the salesmen's cars, for example, that were furnished by a manufacturer or a wholesaler. If that manufacturer or wholesaler operated a fleet of ten or more passenger 1120 automobiles for use by the salesmen, he would be given a unit price lower than the unit price to an individual car owner.

"A. This could be a good assumption. Now, whether you are right on the number of units where he finally got a little better break, could be a moot question. But again this gets back to a fleet in numerical units, and so on.

"Q. 137. Whatever the numerical point at which the

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differential applied, that was a recognized practice in the industry, was it not?

"A. In other words, he may call in and say, now, this is a national account.

"Q. 138. Well, I am trying to keep this distinguished from national accounts.

"A. Yes, but it is hard to do.

"Q. 139. In the fleet account business that is handled by the independent dealer, is it not true that the practice grew up and was recognized in the industry that the fleet account of multiple units of passenger vehicles would get greater discounts on the tires that they bought for those cars than the individual car owner would be able to get?

"A. I think this is a proper assumption. Either competition did it, or something did it.

1121 "Q. 140. I am trying to establish whether or not it was more than an assumption. Was it not an actual practice which, although there may have been exceptions, was well recognized in the industry?

"A. I think that an organization like that would have a purchasing agent, and he would call a dealer or a tire company in and say, now, I have fifty salesmen with fifty cars and they run around the United States, and I want to be sure that I am getting a good tire, good service, and a good price. I think naturally the evolution of that is perhaps the purchasing agent won over the individual car owner.

"Q. 141. With reference to so-called mileage contracts about which Mr. Mitchell inquired, are you familiar with the practice which has developed in some areas of guaranteeing that recapped tires will provide a certain mileage and, to be more specific, the practice of selling those tires with a guarantee that one mill per mile will be the maximum cost?

"A. In other words, that the supplier or dealer says I



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will put these tires on, I will retread them and your cost will be, as you say, one mill per mile?

“Q. 142. Not to exceed that. Are you familiar with such practices?

1122 “A. Oh, I am familiar with this, which is called mileage rental, whatever you want to call it, mileage contract.

“Q. 143. Yes.

“A. But again let me quickly say that you are now in an area where very few tire dealers today handle the mileage contracts business.

“Q. 144. The reason I am pursuing this, I will state for the purpose of orientation, the president of Steepleton Tire Company testified that, at least with reference to some of his accounts, he sells his recapping business on such a basis, guaranteeing that the cost of recapping the tires will not exceed one mill per mile. Now my question is, where the mileage guarantee arrangement is used by dealers, is it the general practice of such dealers to provide an inspection service and free airing and switching of tires, and so forth, in order to get maximum mileage from those tires?

“A. This would just be good business. If, instead of selling for X dollars for the tire, if you are going to do that on a so-called mileage or rental basis, that you occasionally send your service man around and see that the proper pressure is there, that there is no misalignment, that the brakes are grabbing.

1123 “Q. 145. Yes.

“A. I think any good sound business man would have that as part of his program.

“Q. 146. And the two procedures normally go hand in hand, do they not, if there is a mileage guarantee on the tires, then the dealer will make periodic examinations in servicing and see that the tires are properly mated, prop-

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erly inflated, and otherwise being properly used and not abused in order that the mileage can be realized?

"A. This would be good practice. Unless the mileage account had a very good service manager whom he had complete confidence in and was sure that performance were kept up, misalignments caught, and so forth. So this is a two-way proposition. I am not going to sit here and say that where they have mileage they all give this service. However, if I was personally a tire dealer and had an arrangement like that, I think that I would periodically inspect my tires to see that I am getting the expected mileage and service out of them.

"Q. 147. In your position as an executive secretary of the Chicago Tire Dealers Association, do you maintain contact with the recapping business, and acquaint-  
1124 ance with the recapping business done by your dealers?

"A. Now, for this reason, that many dealers are automatically or simultaneously in the retread business, which is a matter of economics, because this phase of the tire business has been rather decent on the gross profit recovery where well managed.

"Q. 148. Generally speaking isn't it true that the tire dealers realize a higher margin of profit on the recapping business than they do on the new tire business?

"A. Yes, this is a good assumption and I hope it is true, because in our solicitation of all types of tire business and in the competitive strain, that if you have a retreading plant and manage it properly, this can be a higher gross profit than even selling new tires.

"Q. 149. Yes.

"A. This is a matter of history and experience.

"Q. 150. Now, I have been using the term 'recapping' and I notice that you use 'retreading'. Are the terms interchangeable?

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“A. Both are synonymous.

“Q. 151. Yes. With reference to fleet repair and servicing work about which Mr. Mitchell inquired, I believe you stated that there was no such thing as a going retail price. Would that represent your answer?

1125 “A. You mean a stabilized price structure to fleets?

“Q. 152. Well, perhaps. Is that what you intended?

“A. This is what I intended to say, that nothing is frozen in the marketing of tires. One day a purchasing agent may get this kind of a price, and tomorrow somebody comes along and lowers it. There is no stability really in a so-called price structure. And this goes true for passenger car tires. You see, we have—and now again, I don't want to expound, but there must be plenty different type of retailers in America where you can go in and buy a tire. We just had three new ones come in. As a matter of record, in the last year or eighteen months we had discount houses, we had food chains, and we have now seen a revitalization of department stores going into the tire business.

“Q. 153. In other words, the competition seems to be getting keener, is that right?

“A. This is correct, the keenest I have seen in just about forty years in the tire business.

“Q. 154. But in reference to the business being done by independent tire dealers in the field of fleet repair and servicing of tires, would it be correct to say that the prices charged for the recapping of such tires of fleet  
1126 operators by and large is a lower unit price than that charged to the operator of a single truck?

“A. This is a good assumption. I mean, if you are going to retread one tire for a customer and you have another customer that has twenty, and you keep your molds hot and everything else, and you pick them up and deliver them, whatever you do, that that fellow who is

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giving you twenty tires to retread is going to get a lower price than the single fellow, the operator with one truck tire to be retreaded.

"Q. 155. In your position as executive secretary of the Chicago Tire Dealers Association, have you endeavored to advise the dealers from time to time what the requirements are with reference to wages, and records to be kept, and so forth?

"A. Oh, sure. I sit down with our attorney and what we call the labor union committee of my organization, and we negotiate with the unions. And this takes months. We finally arrive at a contract or agreement, and we generally make say a two year contract.

We will say, "All right, we are agreed that in 1961 we are going to give you ten cents, the members ten cents an hour increase, and in 1962 seven and a half cents an hour." And this is just a fact. I have just bulletined 1127 my members "Don't forget, on January 1st, all members of Local 82 get seven and a half cents an hour increase, due to our agreement with the unions".

Again let me state this, while we as an association, rather than negotiate, these contracts are individual with the members.

"Q. 156. Are you aware that interpretive bulletin 779 which set forth the percentage referred to in section 779.375 about which Mr. Mitchell inquired, that percentage was published and set forth as early as 1958 by the Department of Labor?

"A. Which percent? Is this the one here, 50 percent?

"Q. 157. 50 percent, yes.

"A. All I can say is, and I have been around a long time, I would like to know who can arbitrarily pick a percentage of business and then start to classify it.

"Q. 158. But you had not seen that percentage at any time—

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"A. No, sir.

"Q. 159. —before Mr. Mitchell inquired about it?

"A. No, sir.

"Q. 160. You testified about the rates of pay among employees in the Chicago area exceeding the minimum rates prescribed by the Fair Labor Standards Act. 1128 It is the practice and has it been the practice in this area to pay over-time after forty hours?

"A. Oh, yes. We absolutely—this isn't only a union directive, but I think it is almost some sort of wage and hour law, that after forty hours you get time and a half.

"Q. 161. That is correct. And your members in this area have been complying with that, whether or not because of the union activity, but at any rate they have been paying time and a half after forty hours, is that correct?

"A. I hope they have. But I will say this, we are solid business men, we are into the second generation here with some of our tire dealers, we try to stay with any law whether we like it or not. We are quarreling with the 4 percent sales tax, we think it is high, but as long as this is the law, our members keep the records, reimburse whatever government agency it is, and live completely within the intent of all laws.

. . . . .

**Redirect Examination,**

By Mr. Mitchell:

"Q. 1. Mr. Hedlund, you were asked to describe the 1129 significance of presentation on the front page of your Exhibit 2, which is 'This Week in Tires' issued for January 8, 1962, the upper part of the first page of which has certain price lists under different classifications or headings. My question is, Mr. Hedlund, whether or not when you published that you intended to convey

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the information, or whether you had a belief that prices were actually paid for tires shown on that list at the prices shown on that list and none other. That is, whether the information at this place on the exhibit reflects the prices in the market place or simply some list price.

"A. All I was intimating is that this is more or less a pricing structure which is a complete reversal of what we were used to up to November 1st. In other words I was showing that there is a lower list price, that the differential between a white and black, which was normally 22 percent, now has variations, that manufacturers have different code prices, and so forth. This was merely an overall informative cross sectional picture of four lines of tires.

"Q. 2. But my question is, sir, does the chart which is on your Exhibit 2, represent the prices that were actually paid for the tires there described in Chicago, or 1130 Omaha, or any given place on or about the date January 8, 1962?

"A. Paid by whom?

"Q. 3. By the purchaser.

"A. The retail customer?

"Q. 4. Yes, sir.

"A. I should live this long that these prices are accepted across the market. This is merely showing suggested prices, and what have you.

"Q. 5. I take it from the way you have answered my question, that the actual prices paid in the market place at different points in this country varied widely?

"A. Yes.

"Q. 6. And I suppose irregularly?

"A. That's right.

"Q. 7. From the price structure described on your exhibit?

"A. I just wish that independent dealers could get

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these prices, in view of the competition that is out there in various forms, shapes, and what have you.

“Q. 8. And then, Mr. Hedlund, you were also examined by Mr. Tineher, as to what the term ‘commercial sales’ meant, and you were asked in connection with that whether or not a greater discount might be allowed  
1131 on sales of truck tires to owners of fleets, of several vehicles, than would be allowed to the owner of a single truck. And my question is whether or not as you understand the recognition in the industry, the sale to the owner of the single truck or the sale to the owner of several trucks at whatever discount, would be any less a retail sale.

“A. No, this has nothing to do with the identity of the class of the purchaser. He is still a retail customer in my eye, and I think to a lot of people that have been around the industry, this is still a retail sale.

“Q. 9. And by the same token you were asked to make certain assumptions and draw certain conclusions with regard to the discount that might be allowed to the owner of a fleet of fifty, or some large number of passenger cars used by, for example, salesmen of a given manufacturer, and I believe your testimony was that competition and market trade practices being what they are, the owner of several passenger cars might well purchase passenger tires at a greater discount than is normally allowed the owner of a single passenger car. Again my question, Mr. Hedlund, is, does that make the sale to the owner of the fleet of passenger cars any less a retail sale?

“A. He is still in my book, in the category a retail customer.

1132 “Q. 10. Is that also your understanding of the recognition of the practice and the definition in the tire industry?

“A. Yes. We—again I don’t want to be repetitive,

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but I have been around as long as most people that are still around in this tire industry, and we have only had really two classifications and what have you, retail and wholesale.

"Q. 11. You were also asked to make the same assumptions and reach certain conclusions with regard to the difference in the prices that might be charged for recapping services where the recapping was to be done on the tires and presumably all of the tires for the owner of a fleet of many trucks or vehicles, as compared to the price charged for recapping of the tires on a single vehicle. My question is whether or not the difference in the price for such recapping service enters into the classification of that service as a retail sale.

"A. Now, this fellow is still a retail customer in my book. His ability to get a better price because he has twenty or fifty units does not put him into another class. And I still have to tell you that I will only still recognize basically two classifications of customers, one is a retail customer and the other is a wholesale customer, 1133 regardless of who he is, or what he operates or what have you. This is the way for years that this business goes into the independent tire dealer's books.

"Q. 12. That leads me to my next question, sir. There was some discussion under your cross-examination concerning direct sales by a manufacturer of the tire for example to governmental agencies, that then you get into a situation completely outside of this two part classification which inherently applies exclusively to transactions by a retailer or independent tire dealer.

"A. Yes. To the best of my knowledge at the federal government level, and I am speaking in terms of Washington, D. C., in bids on particular new tires, I have never seen where a dealer ever got that business. Again, I could be wrong. The independent dealer can still get



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the Park District business here in Chicago, he can still get the State of Illinois tire business, and I still say when he does that, this is a retail sale in his records and the way he thinks about it.

Mr. Mitchell: I believe that is all.

**Recross-Examination,**

By Mr. Tincher:

1134 “Q. 1. One of Mr. Mitchell’s questions brings up this point, Mr. Hedlund, if sales on new tires are made to a fleet account, in your experience does it sometimes happen that the fleet account will buy a considerable number of tires at a particular time and place a part of them in stock to be used as the need arises?

“A. This happens. In his own stock directly?

“Q. 2. Yes.

“A. Yes. Let me show you how this happens. You come to December and he has got a budget and he wants to use it up. He may call a dealer tire company and say ‘I want fifty tires’. He may not use them for sixty or ninety days, but he will pay for them in December, but still hold those tires. This can happen, and this is one of the quirks of corporations and of American business.

“Q. 3. It is not unusual, in other words, for them to order the stock?

“A. No, and he will hold them.

“Q. 4. And even though some tires might be purchased in lots of fifty or more, you would still consider it a retail transaction?

“A. Yes.

1135 “Q. 5. Would you still consider this a retail transaction if this particular purchaser, after buying a lot of fifty tires, could turn around and sell twenty-five of those tires to some other operator, because he was able to make a little profit from him?

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"A. This could happen. This is very unusual that a so-called vehicle operator buys merchandise and then tries to make profit on it from a brother commercial fleet operator. Again this could happen. Maybe they need money to pay bills. Maybe tires went up. This is within the realm of actually happening.

"Q. 6. Yes.

"A. But rarely.

"Q. 7. And when it does happen, do you still consider that it was a retail sale to that fleet operator?

"A. Because the dealer who has sold them, sold them in true conscience, never thinking or dreaming that these tires would again be resold a second time. I think those cases would be so rare that you would have to dig deep to find them. But again I will tell you, in America it could happen.

"Q. 8. Yes, sir. Are you familiar with that phase of the industry which supplies tires to airlines, to owners and operators of fleets of airplanes?

"A. Yes.

1136 "Q. 9. Are any of those sales made by dealers?

"A. Yes.

"Q. 10. Or are they made by the manufacturers?

"A. In the majority, made by manufacturers. But there are certain specialists in America that will sell new airplane tires to these airlines, and there is about three big retreaders in America that have specialized on retreading airplane tires for our commercial airmen. This has become very big business. If you know anything about airplane tires, there are so many landings that you make, particularly with the jets, that the treads are scuffed out. But we have some specialists in airplane tires and airplane tire retreading.

"Q. 11. I take it that is a rather highly specialized business.

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“A. Oh, yes. I only know of three of them, one in Atlanta, one in Oakland, California, who has three set-ups across the country, and there is still somebody else who is sort of an airplane tire retread specialist.

“Q. 12. Now, do you classify that business as retail business?

“A. I would. Sure, this is a customer, because when he sells those tires they go on the airplane vehicles, or his retreads do.

“Q. 13. From your experience in the industry, do  
1137 you have an idea what the percentage of gross profit on sales of new tires is required for a successful dealer?

“A. I can tell you what I think is ideal, and this would be Utopia. And this is the problem: If you watch—and now we have to get out of the tire industry—on any commodity, the gross profits are down and expenses are going up in America, and I have some very good ideas of what are good gross profits today. If you are going to ask me a pointed question like that, and this could be Utopia, if you want an answer.

“Q. 14. I would rather have a practical answer, Mr. Hedlund, one that is realistic and what the experience in the industry indicates is the margin of gross profit to enable an independent tire dealer to continue operating at a profit.

“A. Yes, and I hope I am not quoted, but this is really nice, that if you can come up with 30 percent gross profit on passenger tires, 18 percent gross profit on truck tires, and 40 percent gross profit on retreading. Now if you can have a mix like that and control your expenses, you can still make money in the tire business. Now, there will be many tire dealers who will say, ‘Hedlund, I think  
you are crazy’.

1138 “Q. 15. With reference to the talks you have made at various conventions of tire dealers and other

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meetings, have you made it a practice to advise them with reference to the requirements of the wage and hour law?

"A. No, these are areas that I think are confined to me locally here, and I am generally talking on marketing the product, technological changes, and things like that, new competition.

I rather—perhaps I am a little lazy, and I will say, 'Now, if you want to know about wage and hours, why don't you ask for Mr. Marsh, the executive secretary of the National Tire Dealers Association, he is in Washington, D. C.' These are areas that frankly I don't get into.

"Q. 16. Now, at these functions is it usual for Mr. Marsh to be in attendance too, and if so, in those instances where you have been at such a meeting where Mr. Marsh is present, has the wage and hour law been discussed among the dealers?

"A. Well, I would say that I have heard him discuss it. Maybe briefly I am going to look right here, here in his issue and his speech from Cleveland. Let's see if he mentions wage and hours. I doubt if Marsh covered it here in his keynote talk at the National Tire Dealers 1139 Convention in Cleveland.

"Q. 17. My question was, at various times have you heard him discuss it and explain the regulations of the Department of Labor with reference to wage and hour?

"A. Let me say this. I have read it in the National Tire Dealers Association Dealer News Weekly.

"Q. 18. Yes?

"A. There has been a lot of publicity, and he has put down the facts of life, and he published, if my memory is good, the \$1.15 an hour minimum, and so forth.

"Q. 19. Yes.

"A. He has been very good in publicizing the releases.

"Q. 20. In general have you found that Mr. Marsh has advised members of the association to follow the regula-

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tions as set forth in the Department of Labor interpretative bulletin?

Mr. Mitchell: Well, now——

The Witness: This—I could say I don't know, because, again I read a lot of magazines, and whether he has or has not, I don't know. The only way you could know that is to ask Mr. Marsh, or ask for his publications or copies of his speeches.

1140 By Mr. Tincher:

“Q. 21. Well, at the various conventions or meetings you have attended, do you recall whether there have been discussions of what constitutes wholesale sales and what constitutes retail sales in the industry?

“A. I have got to tell you that to the best of my knowledge there has never been any discussion of this classification. Again, basically while we have some splitting of whether they are part retail and part wholesale, the bulk of independent dealers in America today are concentrating in the retail market. Now, they may have a little X percentage of wholesale. Again, you may find the fellow who is strictly wholesale 100 percent right down the line. But again, numerically I have got to tell you that he is not in big numbers in the tire industry. His days could be numbered.

“Q. 22. In actual practice the terminology used in the industry has been that of dealer sales and consumer sales, isn't that right?

“A. That is correct.

“Q. 23. And the discussion within the industry itself normally does not use the terms wholesale sale and retail sale, isn't that correct?

1141 “A. Well, no. We are more acquainted with, we are going out for the consumer dollar, or we are going out to sell what we call associate dealers.

“Q. 24. Yes.

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"A. Dealers sales. May I say that there is very bad verbiage in the description there of these things. Whoever wrote it up, why they didn't call on somebody to give them a little better guidance and clarification, and so forth. Maybe they did.

But again, let me say this, I will be only too happy at any time, if I am supposed to be some sort of authority in this industry, and I think I am beholden to no one, to come to Washington and help them write some of this verbiage.

"Q. 25. Thank you.

"A. This I think as a good citizen I would like to do.

"Q. 26. Thank you, Mr. Hedlund. While I cannot speak for the Department of Labor in Washington, I believe they would be interested in your views and the information you could give them, but would it be correct, and this I am not trying to belabor the point, but would it be correct in your estimation to differentiate the classes of sales on the basis of consumer sales and dealer sales, rather than in terms of wholesale sales and retail sales?

"A. Yes, I like this classification better than the one that is printed in here, in trying to differentiate between wholesale selling and retail selling. I think your terminology is more understandable at dealer levels, and even at industry levels.

"Q. 27. And as a person who has had a great deal of experience in the marketing of tires, don't you recognize that there is a very strange relationship of the term 'retail' in connection with fleet sales of merchandise at discount prices?

"A. Yes. In other words, to be honest, we think of a retail sale, we associate it with the department store, and what have you. I mean, this is an accepted classification in America. But again, in our tire industry it is a retail sale whether he has a car, whether he has a truck, or what

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he has, as long as he is buying the tire from the dealer and putting it on the wheel. He then becomes in my book a retail customer.

“Q. 28. But perhaps more descriptive a consumer type customer?

“A. Yes, consumer.

Mr. Tincher: That is all.

Mr. Mitchell: No questions.

. . . . .

1146

**REBUTTAL PROOF.**

Thereupon the Government, in rebuttal, introduced evidence, as follows:

**DR. ROBERT C. BROOKS, JR.,**

the next witness, having been first duly sworn, testified as follows:

**Direct Examination,**

By Mr. Tincher:

Q. You are Dr. Robert C. Brooks, Jr.?

A. That is correct.

Q. And I believe the “Doctor” pertains to the Doctor of Philosophy degree which you hold?

A. That is correct.

Q. Where are you employed, Dr. Brooks?

A. Vanderbilt University, Nashville, Tennessee.

Q. And what is your present position there at Vanderbilt University?

A. Assistant professor of Business Administration.

Q. Have you recently been advised that that position is to be improved somewhat, starting with the next academic year?

A. Yes, I have been promoted to Associate professor.

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Q. I have a sheet here which contains some biographical data which you prepared at my request, or at least handed me—I don't know when you prepared it—but would you read from that sheet and give a rough idea of your teaching experience and other professional experience, please, sir?

A. I have a Bachelor of Arts with honors from University of Chicago, which I received in 1946. I received the Master of Business Administration degree from University of Chicago in 1951, and I received the doctorate from the Graduate School of Business of the University of Chicago in 1960. And I was a Ford Foundation Doctoral Dissertation Fellow while I was working on my doctorate.

Teaching experience largely consists of the position of Assistant professor of Marketing at the University of Georgia from 1954 to 1958, and Assistant professor of Business Administration at Vanderbilt, as I told you previously.

For two and a half years I was a Market Analyst in the Market Research Department of Reynolds Metal Company.

I participated in seminars on religion and ethics in business at the Harvard Business School and in a forum on finance at New York University.

1148 Incidentally, the subjects I teach—I teach Marketing at Vanderbilt, both at the undergraduate and graduate levels.

I have done my research in the field of Business Administration and joint practices, and I have these publications as a result of that research:

“Personality Tests and the Selection of Salesmen,” from Georgia Business in 1955.

“‘Word-of-Mouth Advertising’ in Selling New Products,” in the Journal of Marketing in 1957.



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I have a couple of short pieces in the *Journal of Marketing*. I won't bother to list them at this time.

One entitled "Does Low Market Occupancy Indicate the Absence of Monopoly Power?" which was in the *Anti-trust Bulletin* in 1959.

One on "Volume Discounts as Barriers to Entry and Access," in the *Journal of Political Economy* in 1961.

One on "Injury to Competition Under the Robinson-Patman Act," in the *University of Pennsylvania Law Review* in 1961.

One on "Businessmen's Concepts of Injury to Competition," in the *California Management Review* in 1961.

A digest of that appeared in a publication called 1149 "The Executive" that is published by the Harvard Business School. A reprint of that is going to appear in the *Antitrust Bulletin*.

Then an article on "Price Cutting and Monopoly Power" in the *Journal of Marketing* in 1961.

And that article is going to be reprinted in a book, "Readings on Marketing," that is coming out the first of next year.

Then a piece entitled "Economic Bases for Findings of 'Injury' Under the Robinson-Patman Act," which appeared in a publication of the American Marketing Association entitled "The Social Responsibilities of Marketing."

That is the name of one of them. And that is a paper that I read at the last meeting of the American Marketing Association, at the last convention of the American Marketing convention.

And I am a member of the American Marketing Association, as you might guess, and also a member of the American Economic Association.

Mr. Tinch: Thank you, Dr. Brooks.

I think it might be helpful if this sheet is filed as an

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exhibit here, this resume of the qualifications of this witness.

1150 (Thereupon said document was accordingly marked as Plaintiff's Exhibit 14, and same will be found among the exhibits in the cause.)

Q. Dr. Brooks, you have been in attendance at the trial of this case and have heard the testimony of all the witnesses, I believe, with the exception of the two expert witnesses—

A. Yes, sir, that is correct.

Q. (Continuing) —called by the defendants.

Correction—I suppose there were more than two who were in the expert category.

At any rate, you have heard those other than the expert witnesses?

A. Yes.

Q. And you have heard the reading of excerpts from various depositions that have been taken?

A. Yes, sir.

Q. During the course of the testimony to which you have listened, you have heard considerable testimony to the effect that all sales of automotive tires to those who purchased tires for use rather than for resale are retail sales.

1151 Now, on the basis of your training and experience in the field of business administration and marketing, will you state whether or not in your opinion—

Mr. Burch: If Your Honor please—

Q. (Continuing) —this classification is valid?

Mr. Burch: Just so the record will show that I was not asleep at this point, I want to object to any question directed to him other than based upon training and experience in the industry, about which no predicate has thus far been laid.

No jury is present, and no damage is going to be done

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by hearing the testimony, and I expect Your Honor to overrule my objection, but at the same time I wish to make the objection so that Your Honor will know I know at least enough to do so.

The Court: All right. The objection is overruled.

Q. The Court has ruled that you may answer, Dr. Brooks. Do you need to have the question restated?

A. Well, yes. I don't guess it is in order for me to comment on this statement at this time.

Mr. Burch: I would certainly agree that it is not.  
1152 A. Well, let's say it again.

Q. On the basis of the testimony which you have heard in the trial of this case to the effect that all sales of automotive tires to customers who purchased the tires for use rather than for resale, and on the basis of your training and experience in the field of business administration and the field of marketing, do you agree that the testimony so classifying those sales states a valid classification?

A. I do not agree with that.

Q. Do you agree with the testimony of those witnesses whom you have heard classify as wholesale sales only those sales which are made for purposes of resale?

A. I do not agree with that.

Q. Now, in order that we can understand the terms of reference upon which you base your opinions, would you define the term "retail" as it is understood in the field of marketing?

A. In the retail and wholesale trades, which are of course a very large part of the field of marketing, the term "retail" is applied to those transactions where the motive of the purchaser is buying is his own personal enjoyment or satisfaction.

1153 Q. Now, would you define the term "wholesale" as it is understood in the same field?

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A. The term "wholesale" includes all those transactions where the motive of the purchaser is to use the product in the conduct of his business for profit-making purposes, or, if it is a non-profit institution, he intends to use it for the furthering of the aims of his institution.

Q. All right. What would be included under the term "wholesale", as you have defined it, as it is understood in the field of marketing, other than purchases for resale?

A. You would include purchases by manufacturers or commercial firms which are designed to produce another good or service, or to increase the value of some other good or service which will subsequently be sold to one who will not consume it, or who is an intermediary of finally, when it is in final form, will reach the ultimate consumer.

Q. There was considerable amount of testimony by the defendant, Mr. Steepleton, and by others who are part of the tire industry some way or other, that all sales to consumers are retail sales.

Will you state whether or not you agree with that?

1154 A. I disagree with that.

Q. In the field of marketing, is there in general usage some distinction between the term "consumer" and the term "ultimate consumer"?

A. Well, the authorities in the field of marketing have gotten together in the form of definition committee, and that committee published a series of definitions of the various terms in marketing. And the report of the committee was that actually the term "ultimate" is redundant in referring to a consumer because if a person is buying a product to use to produce some other product, or to produce a more valuable product, or a product that will command a higher price as the result of the purchase, he is not a consumer at all; he is a producer.

However, in general parlance, and to make exactly clear

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what you mean by a consumer, oftentimes you will emphasize the fact that it is just the final consumer or the consumer of the product in its final form, or the service which is being purchased, to emphasize that it is limited—retail trade is limited to those cases where the buyer is buying a good or service in the final form, be-  
1155 cause using the adjective “ultimate” you set it apart and make it perfectly clear.

Q. Is there an awareness among the authorities in the economics and marketing fields that the term “consumer” is used more loosely and with connotation other than that of ultimate consumer?

A. Certainly, the term in just a casual sense, conversational and without attempting to be strict about it, you might use the term “consumer” for a business firm that consumes one product in the manufacture of some other product or service, which he will then sell to someone else further down the line.

But as used—when someone is talking about “retail” and “wholesale”, they are very careful about the usage of these terms.

And that is, I guess, the reason the term “ultimate” so generally appears. It is so that no one would make the mistake of confusing some intermediary producer with the man who consumes the product in the final form.

Q. Doctor, in the testimony that has been taken in this trial, you have heard the term “consumer” or “user” used.

Would you comment on those terms being used interchangeably and with reference to the basic definition of “ultimate consumer”?

A. Well, every one who buys a product is going to use it in some fashion or another. The question is how are they going to use it.

If they use it for a profit-making purpose, somewhat

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by necessity they have to use it to produce some other good or service, which they then sell at a profit after they have paid their expenses.

If they are going to use it for their own personal satisfaction or enjoyment, then it is another case.

Q. Well, in your use of the term "produce a good or service," would you give an example of the product or service which might be related to any testimony you have heard in this trial?

A. Well, one very good example in this particular case would be that of a trucking firm that is selling transportation service, or a bus line that is selling transportation service, and they use equipment, they use tires, they use bus tires to produce this transportation service which they are going to sell—probably in the case of the bus line to the ultimate consumer.

Q. Now, Dr. Brooks, I would like to ask you a few questions based on assumptions of fact.

1157 Assume a company operates a fleet of ten or more trucks in its business of transporting goods, and from time to time it buys from this defendant company, Steepleton General Tire Company, a portion of the tires that it needs for use in operating its trucks, how would you classify the sales of such tires by the defendant as to whether they are retail sales?

A. I would classify them as non-retail sales.

Q. Would your answer be different if the sales were made in lots of only one or two lots at a time to such customer?

A. No, my answer would be the same.

Q. Would your answer be the same if defendant's customer was a manufacturing concern operating the same number of trucks in its business?

A. It would be the same.

Q. Or if the customer was a laundry?

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A. It would be the same.

Q. Or a sand and gravel company?

A. It would be the same.

Q. Or a general contractor or trucking contractor?

A. The same answer would apply.

Q. In fact, would your answer be the same for any  
1158 business establishment which was buying those  
tires for that number of trucks for use in its business?

A. Yes, sir.

Q. With respect to the question of whether the sale of  
tires is a resale sale or not, would your answer be any  
different if the defendant's sales of such truck tires were  
made to a local government unit such as the county highway  
department, county school district, or county road  
district, or a municipality?

A. It would be the same answer, of course, on the basis  
that their motive was the furthering of the purposes of  
the institution.

Q. And assume that the tires so sold by the defendant  
are for use on earthmover or road grader equipment.

A. I would still classify it as non-retail.

Q. And assume, then, the situation that such sales are  
sales of passenger car tires for use by law enforcement  
officers or public officials of a county or a municipality?

A. They would also be non-retail.

Q. Now, I have some questions, Dr. Brooks, with reference  
to national account transactions that have been discussed  
in the testimony of Mr. Steepleton and Mrs.

Lauderdale, which I assume you heard and recalled.

1159 A. Yes, sir.

Q. Based upon that testimony, can you express an  
opinion as to whether such sales, namely, the delivery  
of tires to the so-called national account customers of  
General Tire & Rubber Company by Steepleton General

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Tire Company, and subsequent transactions with reference to the invoices or records of delivery and crediting of Steepleton Tire Company's account by General Tire & Rubber Company, would you state whether or not those transactions constitute sales of merchandise by Steepleton General Tire Company?

Mr. Burch: If Your Honor please, the same objection.

And I expect Your Honor to handle it the same way, and would not blame Your Honor if he did. But I call Your Honor's attention that here under the guise of putting on an expert witness they have asked the witness his opinion on a question of law, whether or not that would constitute a sale.

That is determined by the Uniform Sales Act. That says what is a sale. And cannot get—, and I think what  
1160 he considers or anybody else—it is or is not a sale dependent upon that Act.

Go on with the question, if you want, and put it in the record.

The Court: The objection is overruled, if you are objecting.

A. Well, that is often called a drop shipment transaction where a firm buys a product from another firm and instructs that firm to deliver it to some other firm who is buying from this firm who makes the purchase.

Now, let me make this clear. You can, as a drop shipper, you can make a sale to a customer, buy your merchandise from a supplier, and instruct the supplier to make the shipment direct to the customer. In effect, there are two sales taking place simultaneously, the sale from the supplier to the firm that is requesting the drop shipment, and the sale by the firm requesting the drop shipment to its customer. But the delivery is made direct.

Q. In view of your answer, Dr. Brooks, would that transaction properly be a part of the gross annual dollar



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volume of sales with reference to Steepleton General Tire Company?

A. Yes, certainly. This is Steepleton's merchandise.  
1161 He owns it. He is delivering it to a customer of the General Tire Company in accordance with some previous agreement whereby upon this customer's request of delivery the sale of the tire is made by Steepleton to General, but delivered to General's customer.

I might add that of course General is then obligated to pay Steepleton, and General's customer is obligated to pay General, of course.

Q. Are you acquainted professionally and personally with Dr. Leigh, who testified earlier today?

A. Yes, I am happy to say that on a couple of occasions he has asked about whether I would be interested in working for him up at the Akron University.

\* \* \* \* \*

1165 Q. Dr. Brooks, I have here Plaintiff's Cumulative  
Exhibit 13. And I turn to the third sheet of this  
1166 cumulative exhibit, and ask you to read aloud that portion which is in quotations which—well, that portion in quotations.

A. (Reading) "The character of tire dealers has altered as they adapted themselves to the new competition and to changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recap-pers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the other hand, the drift of pas-

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senger tire purchasing from downtown stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services.”

Q. Do you have educational training or experience outside of the academic field which enables you to comment on that quotation of Dr. Leigh?

1167 A. I would like to first say a couple of things here—  
may not be too important. In other words, the word reads there “t-a-p”. Obviously, it is misspelled as “t-o-p” in this exhibit. Don’t know if that is important. The other one is that I recall the footnote from this book which was appended to this quotation.

\* \* \* \* \*

1174 Q. Dr. Brooks, quoting from Plaintiff’s Cumulative  
1175 Exhibit Number 13, the part that appears in quotation marks on this page, Dr. Leigh states, “The character of tire dealers has altered——”

Mr. Ray: He read it out loud.

Q. This was read by you?

A. Yes.

Q. Do you agree with the quotation from Dr. Leigh’s portion of the book?

A. Yes, I agree. I might say you also were asking me a question of whether I had experience in regard to this particular trade.

Mr. Tincher: Yes.

A. (Continuing) Well, this is my business. I am a professor of business administration. And it is my business to keep up with developments in the distributive trades and to do research on business practices in these trades just the same way Dr. Leigh does. He is not academically—our job is to look at what is going on and to

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find out what is going on, and to give it to our students, and to share it with other people who are teaching business administration.

Q. And as to the research, does that include the tire distribution system?

A. Certainly, because this is one of the most important segments of the area. It is a very important part of my subject matter. I have students who keep me up to date on some of these things.

Mr. Tinch: May I have Exhibit Number 6, the bulletin?

Q. Dr. Brooks, I have passed up to you bulletin which has been marked and entered as Exhibit Number 6 for the plaintiff in this case, and I ask you to look at page 33, about half way down the page, in the first column, Section 779.37, "Application of the 13 (a) (2) and 13 (a) (4) Exemptions to the Automotive Tire Trade," skipping to subparagraph (b):

"In applying the tests of the exemption under section 13 (a) (2), all sales of tires, tubes, accessories and tire repair services, including retreading and recapping, are recognized as retail in the industry, except those set out in subparagraphs (1) to (6) of this paragraph."

Now, I will read subsection numbered (1)—

Mr. Ray: He has already read it.

Q. (Continuing) You have read subsections (1) through (6) of this bulletin, have you not?

A. Yes, sir.

1177 Q. Do you agree with the classifications as set out there in the bulletin with reference to their being other than retail sales in the tire industry?

A. Yes, I do agree. I think they are a little limited in some of those, but I imagine that is for administrative purposes. But, if anything, I would say that—well, strictly speaking, sales to commercial or business buyers who have

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less than ten trucks would also be non-retail. But I can see for administrative purposes why you might want to draw the line at that point.

Q. Do you mean by that that if the representatives of the Wage and Hour Administrator's office had considered material and arguments and various and sundry statistics presented by the industry, that the Administrator may have taken those into account and given a determination which was more limited and more professional to the industry than the strictly academic viewpoint would be?

A. Yes, sir.

Mr. Tinch: You may have the witness.

1178

**Cross-Examination,**

By Mr. Burch:

Q. Now, Doctor, among the other research that you have done—and I am not asking you whether you agree with it—what your opinion is about it—but I am asking you if you are familiar with Section 213 (g) of 29 United States Code Annotated, which defines a retail or service establishment there in the Act.

Have you read it?

A. I haven't read it in the United States Code.

Q. Well, let me read it to you:

“A ‘retail or service establishment’ shall mean an establishment seventy-five percentum of whose annual dollar volume of sales of goods or services (or both), is not for resale and is recognized as retail sales or services in the particular industry;”

Have you read that?

A. Yes, sir, I have read it elsewhere.

Q. Now, the fact that Congress put that in the Act clearly indicates that particular industries have particular classifications, is that not so?

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A. Yes, sir.

1179 Q. Now, are you prepared to tell us what industries do or what industries do not have that particular classification that you in your mind have given as governing the tire industry?

A. This is classification that is based on practices in industry.

Now, the tire industry of course has ways of classifying its customers for various purposes. And as far as identifying the types of customers that we have, I am aware that the tire industry has a traditional three-fold classification of its customers, namely—

Q. Well, have you particularly researched the various industries so that you can tell us now what industries this definitely fits and what industries it does not fit?

A. This is a—there is nothing that I have ever come across which is in conflict with this definition, which of course comes out of research of industrial practices.

Q. So, as far as you are concerned, this business of “retail sales or services in the particular industry” is meaningless because, according to your research, the classification is the same in all of them?

1180 That is your testimony, isn't it?

A. Well, I wouldn't say it is meaningless. But I think the results would turn out to be the same.

Q. So you would give the same definition of wholesale or retail whether you were in the ice business, whether you were in the fuel business, whether you were in the whiskey business, whether you were in the petroleum products business, whether you were in the tire business, whether you were in the engine business—whatever it was, it would be the same?

A. Well, my opinion is that it definitely would be consistent with the one I have given.

Q. Are all of those industrial?

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A. Yes, sir.

Q. Now, as bearing upon this research that you have done in the tire industry, in this brochure here I see about your teaching experience, and when you say "Other professional experience," you say you have been a market analyst in the General Sales Office of Reynolds Metals Company.

This is an aluminum company?

A. Yes, sir.

1181 Q. And been a participant in the Danforth seminar on religion and ethics in business at the Harvard School of business in 1959. That is so?

A. Correct.

Q. And you have been a participant in a forum on finance at New York University in June, 1960.

That is the other professional experience there listed on the sheet, wasn't it?

A. Yes, sir.

Q. Now, you haven't listed any in the tire business. And I want to check some things with you as bearing upon your knowledge about it.

Have you ever been employed by anybody in the tire industry?

A. No, sir.

Q. Have you ever worked in a recapping plant or in a tire manufacturing plant?

A. No.

Q. Have you ever worked in a retail or wholesale establishment?

A. Yes, sir.

Q. Of the tire industry?

A. Not in the tire industry.

1182 Q. Every question I ask you has to do with the tire industry unless I specify otherwise.

Have you ever been in your academic and professorial

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capacity, or any other capacity, attended any seminars in the tire industry?

A. I haven't attended any small seminars. However, there were these tire industry meetings down at the University of Georgia, and I talked with the professors who were there on that.

Q. Talked with some of the professors?

A. Yes, sir.

Q. —That had been to them?

A. Yes, sir.

Q. Had been to the conference?

A. That is right.

Q. And have you been employed as consultant to anybody in the tire industry?

A. No, sir.

Q. Do you subscribe to any publications of the tire industry?

A. No.

Q. Have you ever testified before any Congressional Committees on the tire industry?

A. No, sir.

1183 Q. Have you ever read the testimony of representatives of the tire industry before Congressional Committees?

A. Yes, sir.

Q. Well, can you point out in all of your research, just as you have stated there, whether or not you agree or disagree with the testimony of Dr. Leigh,—point out the testimony of representatives of the tire industry before the Congressional Committees with whom you agree or disagree?

A. Well, in reading this testimony, I saw nothing in conflict with my opinion about it, and I did not make any notations of who those people would be.

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Q. Did you find any testimony before the Congressional Committee—or any Congressional Committee—by anybody in the tire industry who recognized the definition of retail and wholesale in that business that was not that it is retail if it is for consumption or use, and wholesale if it is for resale? Every line of evidence before every Congressional Committee you read was to that intent and purpose, was it not?

A. The classification—there is another classification.

Q. Would you please answer the question, and we can get along better?

A. All right.

1184 Q. If you will answer it, if you can, yes or no, then explain.

A. Well, will you state the question again, then?

Q. The question is: In all this reading you did of testimony before Congressional Committees which you have just stated you did, did you find a line of evidence by anybody from the tire industry that did not bear out the provision that in that industry that if a sale is to be an ultimate consumer or user it is retail, if it is for resale it is wholesale?

A. I will have to answer that in this fashion, that I can't refer—and I am sorry that I can't give a more direct answer—I would have to refer to the testimony to cite evidence from that testimony.

But I have seen "retail" appear in another classification separate from that of "wholesale" or that of "retail".

Q. In a Congressional Committee, by anybody in the tire industry. That is my question to you. That is what I am talking about.

A. I am sorry that I am not able to tell you that because I can't point to it.



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Q. Now, on your other qualifications, you have been  
1185 very familiar with practices in the tire industry,  
about selling practices, and you know what they  
are about when I use the language of the tire industry,  
do you?

A. Not completely. At this particular point I think so.

Q. Well, now, you know when you are located in a town  
they have a particular jargon, just as if I were to say  
to Mr. Clark, "The rule in the Shefley case is no longer  
the law in Tennessee," he would know what I am talking  
about but you would not, would you?

A. Yes, sir.

Q. And if he said it is a matter regarding an expert  
in economics, it would mean something to you gentlemen  
but would not mean it to us, would it, sir?

A. That is correct.

Q. Now, you know that every industry in its publica-  
tions and in its trade meetings and in its communications  
between its members has a similar idiom, they all have  
their unique expressions to characterize the industry,  
don't they?

A. Yes, sir.

Q. So, in order to follow what people in the tire  
1186 industry were talking about when you made these  
researches into their practices, you of course ac-  
quainted yourself with their idiom, didn't you?

A. Well, insofar as they use jargon. But there are some  
places where they would not use jargon.

Q. Well, you came across the phrase, the "MTO".

What is the "MTO"? You consider that you did not  
run into anything about the "MTO"? What is "MTO"?

A. I would simply have to guess about the words there.

Q. Well, when you read about these hearings—about  
parts of hearing—the "MTO", what were they talking  
about?

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A. Well, if I saw that in context I could—I would either determine what it meant from the context or else I would make inquiry, if it seemed to be an important point.

Q. You have never seen that phrase before?

A. I don't recall seeing that phrase, sir.

Q. If I told you that you could get MTO cheaper at Steepleton than you could at General, what would it mean?

A. I wouldn't know.

Q. Well, if I told you that the MTO, Doctor, is manufacturer's take-off that somebody would take off a  
1187 new car and go into Steepleton's store, would that mean anything to you?

A. No, sir.

Q. What is an "OB" take-off?

A. I don't know.

Q. Never run into that either?

A. Not that I recall. You must, of course, relate that whenever you read it at the time to the context, knowing full well what it meant—and just have forgotten.

Q. What is Bucron?

A. Well, I gather this is a form of rubber.

Q. What form of rubber?

A. Some kind of—this would be conjectural—I don't know.

Q. You don't really know, do you?

A. No, sir.

Q. Actually, you don't know anything about the tire industry as an expert in the industry, do you?

A. I disagree with your statement.

Q. Well, let's just analyze what you are talking about. You have not been to any meetings, you haven't worked for them, haven't read any of the technical  
1188 publications, you haven't been before committees—

A. I don't feel that that is required by the type

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of work I do. I limit myself to those things that are of fairly general interest, and otherwise, in teaching students in the university—

Mr. Burch: Oh.

A. (Continuing) I don't go into the technical issues of that sort. It would be a waste of time.

Q. You know Dr. Beck, who has been widely quoted as upholding your view?

A. I think it is Beckman.

Q. It is Beckman, yes.

A. He would be very hurt if he heard his name pronounced that way.

Q. And you see, I don't know any more about the literature on this business than some people do about the tire business.

Mr. Ray: While he is looking that up, Your Honor, I might comment that I believe Mr. Burch in some way may not be too sure there isn't twelve men sitting up there instead of one man or judge. And his approach here would indicate that.

Mr. Burch: I don't know what Mr. Ray is about, if it is an objection.

1189 Mr. Ray: Yes, you do.

Q. Now, you say you don't think it is necessary to know about those things?

A. Yes, sir.

Q. Now, Mr. Ray—

A. (Continuing) Not for purposes of my job.

Q. Mr. Ray there just said something—it is some import for the record.

He went over certain cases with you in which what you have just said in substance has been clarified by the courts, didn't he?

A. No, sir.

Q. Did he read you this excerpt:

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"We believe that the company here amply sustained the burden of proving that its business and its sales are recognized as retail in the fertilizer industry. Industry members were unanimous in their opinions on the question, and offered a reasonable basis for their distinctions, which cannot be arbitrarily rejected because they were interested witnesses. The Secretary's evidence was for

the most part based on the classification of the fertilizer industry for census and other purposes,

made by general standards adopted for use in classifying all business. Thus Professor Beckman, while an expert in matters relative to the census of wholesaling, did not profess any personal knowledge of the fertilizer industry. He had never been in a fertilizer plant. He did not believe such knowledge to be relevant to the issues, stating, 'I don't think it's pertinent and I wouldn't even go across the street to accomplish that purpose'."

A. Umhum.

Q. Now——

A. I don't——

Q. What the Court said about that—you mean he did not go over that with you at all?

But didn't he or Mr. Tincher one here—in talking about the testimony of Dr. Buzzell—that is correct?

A. No, that is the first time I have heard that.

Q. That is the first time you have heard that?

A. But that is the basis of Mr. Beckman stating—the basis of the evidence.

I cannot use there someone else's facts or clarifications as the basis for my own testimony.

Mr. Ray: If Your Honor please, I would like to object to Mr. Burch—he makes a big point on this. I object to just taking him to task on his testimony, already testified to these facts, so he is going to take the cases here and make a big thing on these explanations.

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Mr. Burch: I have got my opinion about the witness, but not that he is lying.

Q. Now, is there anybody to your knowledge there that has any different opinion than you on this subject, the clarification of retail and wholesale?

A. No, sir.

Q. You just state the only view you know of that is accepted and in current acceptance anywhere?

A. Well, there it is, that the term "wholesaling" is used to designate all sales other than retail sales. Now, some people—and in fact by necessity you have to talk about sub-categories on wholesale trade, such as industrial sales. But they are all considered under the head of wholesale. When we talk about wholesaling, we are not merely including the sales for resale, but such character of other sales such as I have indicated.

Q. When you say "we", who is "we"?

A. The people who are in the business of looking at the wholesale and retail trade and trained to give an objective discussion of practices in the trade.

Q. Let's use another "we". Let's don't use "we" as people in the business of looking at the industry. Let's use "we" as we who are in the business.

Do you know any of us that are in the tire business that agree with you?

A. Well, I think that in talking about classification—

Q. If you can give me a yes or no, and then give me anything you want, we will move along much faster.

A. Well—

Q. Do you know any responsible individual in the tire business who agrees with your classification of wholesale and retail?

A. I will say yes, in that the testimony—well, for one thing, the testimony of people who have given depositions on your side and on this stand or in this proceeding to my

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mind have—when you refer to their terms of classification  
of types of customers, rather than at what their  
1193 terms are, and the ones we have to buy tires here on  
some other basis, that they do recognize it.

Q. Well, we have got the record as to what people testified to here.

A. Yes.

Q. And my own view is that they all have testified just the opposite from you. But that is a matter the Court will finally decide.

Other than the people who have testified here, do you know anybody in the tire industry who agrees with you that a commercial sale is not a retail sale?

Can you give the name, address, telephone number, if you would know?

A. Can't do.

Q. You don't know anybody does, do you?

A. Well, no, sir, I know somebody—know one in that category.

Q. Well, now, there are, of course, thousands and thousands of people in the tire business. And in your research, out of the dozens of people you have met and the people you consider as expert witnesses in this case, you must have interviewed more people than one to see if  
1194 they agree with your pedagoguery—the views that  
you have, haven't you?

A. I did not feel that was necessary, Mr. Burch, because from the depositions I had the very clear impression that they did recognize it the way I do except for purposes of—for some other purpose. In other words, in context of classifying types of customers, it seemed to me it was common to recognize this three-fold classification.

Q. Can you tell me the name of a single person whose deposition you have read who has not said that a com-

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mercial sale in the tire industry is classified as a retail sale?

Take the depositions anywhere. If you can find that, take them out and do it.

A. Well, this is evident there that the question gives a situation where they have to place their three-fold classification that they are accustomed to into a mold—

Q. Dr. Brooks—

A. (Continuing) —which involves only two classifications.

Q. Dr. Brooks, I am very respectful of men of learning, and you have got a full panoply, and you are a nice man. But I have also a respect for directness.

Can you tell me—give me the name of any person  
1195 in the tire industry who you can cite at this time  
who will say that a commercial sale is not a retail  
sale?

That is my question. Now, answer it.

A. Not on this.

Q. Very well, sir. Do you know of any widespread body or belief that is generally accepted that holds the view that all sales to the ultimate consumer, no matter what the quantity, are retail, and all sales to people for resale are wholesale?

A. Certainly, this is correct. But we must be careful of the term “ultimate consumer”.

Q. Every ultimate consumer. Do you know any respectable authority that holds that every sale that is not for resale is retail?

I will put it that way.

A. No, sir.

Q. You don't know any?

A. No, sir.

Q. I am reading Chapter 1 of the Tennessee Retailers Sales Act which regulates every transaction in this state:

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“‘Retail Sales’ or a ‘sale at retail’ means a sale to a consumer or to any person for any purpose  
1196 other than for resale in the form of tangible personal property.”

A. Well, that is giving two categories of consumer. Well, then, any person buying other than for resale—that does not equate my opinion. I have read that particular passage, and that is retail for purposes of that Act.

Q. Well, I am talking to you about retail for purposes of the tire industry, too.

A. Well, I will grant that this is the definition of “retail” for purposes of that Act.

Q. Well, so, if Mr. Steepleton sells a thousand tires to Gordons Truck Line, Mr. Steepleton classifies it as a retail transaction, and the Commissioner of Revenue of the State of Tennessee—they classify it as a retail transaction, do they not?

A. I would say that the Commissioner—no.

Q. You would say yes or not?

A. No, sir. And I will have to explain.

Q. Do.

A. The Revenue Commissioner classifies it as a sale that is subject to the tax.

Q. Have you got any idea of what the Commissioner thinks about it other than what—the way the law  
1197 phrases it—plain enough?

I am repeating it:

“‘Retail Sales’ or a ‘sale at retail’ means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property.”

Do you know of any thinking of the Commissioner other than what the law says it is?

A. The law is designed to collect revenue, and they have included among the sales on which tax must be paid



*Testimony of Dr. Robert C. Brooks, Jr.*

retail sales; they have also included all sales other than for resale.

Q. Now, the definition——

A. I don't think it is necessarily.

Q. The definition that I gave you, you know, now that it has been called to your attention, is in effect and I have correctly read it, I believe, Doctor?

A. Well, you had a lot of quotes there.

Q. Well——

A. (Continuing) But maybe it is, but I don't—I am sure you read it correctly.

Q. The quotation or the statute?

A. These are the terms for the—this is not called the Retail Sales law.

1198 Q. It is——?

A. It is called the Sales and Use Tax law.

Q. Now——

A. (Continuing) I see. Retailers' Sales Tax Act, yes, sir.

Q. Now, you said before you read that—you stated positively it was not called that?

A. This is my impression from earlier reading. And I will still subscribe to that because even on second—the title of it, Retailers' Sales Act—see, it doesn't say—Retailers Sales Tax Act, as written.

Q. Now, that is the difference you wish to call attention to.

If Mr. Steepleton sells a thousand tires to Gordons Truck Lines, according to his testimony, and all these other people who have testified all classify it as retail sales, you say that is wrong?

A. No, sir, he may classify it—he may use that term to indicate those sales on which he must pay sales tax. I don't think that is wrong necessarily.

Q. Is that the proper classification that he makes there in that case?

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A. If for the purpose of accumulating the sales on which tax must be paid, it is appropriate.

1199 Q. So, when the industry makes the classification, you believe you or somebody else can come down out of the dormitory or college and find out what their purpose was and then have them conduct their business in line according to the purpose, is that it?

A. No, sir. I am simply saying that I don't see anything wrong with him accumulating those sales for that purpose.

The Court: Suppose we have a little break in the proceedings, gentlemen, about ten minutes.

(Recess.)

Mr. Burch: May I proceed, Your Honor?

The Court: Yes, sir.

Q. Dr. Brooks, in your researches of your studies of the tire industry, are you aware of any meetings that were held by representatives of the tire industry generally in which they met and freely and voluntarily entered into their own definitions of retail and wholesale for their industry?

A. Yes, sir.

Q. What are some of those?

A. Well, the NRA codes would be the ones that come to my mind.

1200 Q. Well, now, let's start with that, now, just a minute. You don't hardly remember the NRA code, do you?

A. No, sir. I remember that Blue Eagle, though.

Q. The NRA code resulted from a statute which suspended the Sherman and Patman Acts and made it possible for the industries to band together for the purposes of fixing their prices, didn't they?

A. Yes, sir.

Q. Later declared unconstitutional?

*Testimony of Dr. Robert C. Brooks, Jr.*

A. Right.

Q. But before it was declared unconstitutional, each industry did form its own industry code with the Government's sanction, and the people themselves decided how to run their industry, didn't they?

A. Yes, sir.

Q. Now, the NRA code that was adopted by the tire industry was not in accordance with your definition, was it?

A. Well, I saw that and——

Q. When did you see it, by the way?

A. I saw it—oh, about three or four days ago. I had seen it earlier, though. I saw it earlier than that. But I did see it three or four days ago, it is true.

1201 Q. Do you know that back in the dark days of 1934 that the tire industry did adopt exactly the same definition of "wholesale" and "retail" that Mr. Steepleton had adopted, and exactly the same that the Sales Tax Act has adopted, don't you?

A. I looked at those codes and I did not——

Q. I asked the question——

A. No, sir.

Q. Do you know that they did that, or do you not know that they did that?

A. They did not adopt the same definition.

Q. Well, I will read the term "Retail," and I am reading from Article 1 (a), Code number 410, approved May 1, 1934, entitled "Code of Fair Competition in the Retail Rubber Tire and Battery Trade."

Section 1:

"The term 'Retail Rubber Tire and Battery Trade' or 'Trade' as used herein, shall mean the sale or offering for sale to the ultimate consumer and not for resale purposes."

Did I correctly quote it, as far as your memory goes?

*Testimony of Dr. Robert C. Brooks, Jr.*

A. Yes, sir.

1202 Q. Now, then, again——

A. (Continuing) But I would like to explain why I don't feel that that is——

Mr. Burch: Very well, sir.

A. Can I explain?

It seems to me that this is a definition of a retailer, and it leaves out those firms who sell for resale because of the qualifying phrase "and not for resale." That leaves out the firm that sells for resale.

This is not a percentage thing. There is nothing about percentages or even predominance in there.

Q. You mean to say that under your consideration of the NRA code that if you sold one dollar of wholesale that you were not a retailer?

A. Well, of course any——

Q. Do you or not?

A. There might—some inconsequential——

Q. It meant preponderately, didn't it? It is not like being a little bit dead or a little bit pregnant or a little bit something else. According to your testimony, if you did any of it, you weren't the other, is that what you mean?

1203 A. Not by the definition—what you are telling me.

Q. So that under the retailers' code of NRA, that anybody who sold anything for resale was not a retailer—is that what you are telling me?

A. Under rigid interpretation of the code,—did you find any interpretation or any ruling?

Q. Or anything else to that effect? You can't give us, then, anything to sustain that conclusion?

A. It seems to me that this is the code for firms who do sell tires, batteries and accessories, or firms that Mr. Steepleton would sell to. This would not include the firms

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like Mr. Steepleton, who is in the tire business and who sells to these firms you are talking about.

Q. Well, now, Dr. Brooks, you haven't got any interest in the outcome of this case; you want to see the correct result reached, don't you?

A. Yes, sir.

Q. And I will ask you if you don't know that the industry adopted this definition:

“The term ‘retail rubber tire and battery trade’ or ‘trade,’ as used herein, shall mean the sale or  
1204 offering for sale to the ultimate consumer and not for resale purposes.”

No matter what you think about it, that is what it says, doesn't it?

A. Yes, sir.

Q. So, according to this code, everything that was sold to the ultimate consumer was retail, wasn't it?

A. Not in accordance with this code, as I understand it. To my mind this code applies only to firms who do not resell.

Q. Now, is all your testimony based upon the same firmness of opinion that you hold on this one that you have just expressed?

A. Well, yes, sir, I believe it is.

Mr. Burch: Very well, sir.

A. (Continuing) It is my opinion.

Q. So you say that—

A. (Continuing) There are other reasons than simply what I have indicated.

Q. Let's pass, then, to something else.

Now, the next time that the industry got together on defining what was retail and wholesale was—another emergency situation—was when the incipency of war made it necessary to regulate prices.

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1205 What did they do, do you recall?

A. At this time I don't.

Q. Well, would you think it was fairly important, then, that you know what the industry, when it convened and decided on terms to govern itself—wouldn't you think it important to know what its definition was?

A. Well, frankly, I thought the NRA codes were a very good source of that sort of information, and I did not—I have not paid too much attention to the OPA code because it was a wartime situation and the purposes of the code was one of rationing, and things like that.

Q. You have learned all that within the last three days, because you did not know about the NRA Code until then?

A. Yes, sir, I have known about NRA ever since I started in the business.

Q. You haven't read it?

A. I have read NRA codes. I don't know whether I read the tire industry, actually.

Q. The OPA Act, of course, was sustained in every case that was tried, that covered numerous courts for several years. It was the result of a collection of thinking in the industry, in which the industry got up its own  
1206 definition.

And do you know what that definition was?

A. No, sir.

Q. I am going to read it to you.

And this, counsel, is published in 7 Federal Register, page 35, on December 30, 1941, nineteen days after Pearl Harbor.

“When used in this Schedule, the term ‘Sale at Retail’ means any sale to a purchaser for use by such purchaser and not for resale.”

And that refers particularly to the rubber industry relating to retail prices for rubber tires and tubes. That is price schedule 63.

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Now, let's carry your contention that you are contending for to its conclusion. And, for example, whether or not it is reasonable.

I ask you whether or not you think it is reasonable.

According to your definition, any sale to a person who does not use the product for his own personal enjoyment should be wholesale, should it not?

A. Yes, sir.

Q. Any sale that is used to further commerce and where the purchase is made by, say, a truck driver, not  
1207 for his own use, is wholesale?

A. Yes, sir, for a business purpose.

Q. So, if a taxi driver or the owner of one gravel truck drives up to any Humble gasoline station in this city and buys nine and a half gallons of gasoline out of the pump, that is a wholesale sale?

A. Yes, sir. But it would be hard to collect sales tax on the meter, I would imagine.

Q. Doctor, in all your wisdom have you not learned that there is no sales tax on gasoline?

(No answer.)

Mr. Burch: That is all. I don't want to ask him any more.

**Redirect Examination,**

By Mr. Tinch:

Q. Dr. Brooks, in addition to your acquaintance with the tire marketing industry, as distinguished from the tire manufacturing industry about which Mr. Burch was asking you, I take it that you have had the usual experience buying tires for your own use and for your own automobile, have you not?

A. Yes, sir.

1208 Q. Mr. Burch inquired something about your experience in wholesaling, and when you gave an affirmative answer he did not pursue that point.

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Would you explain briefly what your knowledge from experience in the wholesale business has been, sir?

A. Well, my father was a wholesale grocer, and I worked for him from time to time, and I have bought accessories and automobile parts for his vehicles which were used in his business.

Q. Could you say whether those parts and accessories were purchased at wholesale?

A. They were purchased at wholesale. I got what is called the commercial discount.

Mr. Tincher: That is all.

**Recross-Examination,**

By Mr. Burch:

Q. You say your father was a wholesale grocer. He was in the business of purchasing groceries for resale, wasn't he?

A. Yes, sir.

Q. Now, as part of what you say is a wholesale transaction, does that imply that you get a price cheaper than the prices paid when you get a retail transaction?

A. In general, yes, sir.

Q. So if a man is buying at a higher price in one category than is paid in another category, the higher price goes with the retail concept and not with the wholesale concept?

A. Yes, sir, that is a broad generalization, but there are exceptions to it.

Q. Now, does the concept of continuing service go with the wholesale concept or retail concept?

A. I think that is something you find in both wholesale and retail transactions.

Q. Well, let's generalize, if you can. Don't you usually find that the ultimate consumer expects more service than the person who buys for resale and does not use the item?



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A. No, because the consumer seems to be going into the do-it-yourself type of thing where he actually takes over some of the services that were formerly done by the businessman, while many of your large commercial customers are shifting some of their functions they probably performed to their suppliers, and these are services they get along with the product.

Q. So, as you testify—so we will know what you  
1210 are telling me, you consider there is a greater degree—you consider the concept that you expect more service to go with a wholesale transaction, generally speaking, than with a retail transaction? Is that what you are telling me, Doctor?

A. No, sir. I am saying that both of them involve services in varying degrees, and that there is possibly a trend toward more service at the wholesale level and less at the retail level, which was possibly gratuitous, I don't know.

Q. Now, if he purchases a wholesale television, he gets no service with the television, does he? The television does not have to perform for him, it just sits there grating on his nerves, he does not expect any service, though another ultimate user getting this thing gets service and is entitled, of course, to have some service?

A. Well, no, most customers are entitled to it, in any event—the ultimate consumer.

Q. My point, as I say, you expect service to the ultimate consumer and not to the man who holds it for resale? Is that so or not?

A. No, sir, they have to—I don't think that is taken into account on services which are provided for a  
1211 middleman by his supplier. For example, a one-day delivery service is getting to be very common in some trades. Now, this is not servicing the product, but it is performed—or a service with the product.

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Q. I am talking about servicing the product. I trust that I make myself clear about this, Doctor. Don't you know that a continuing service on the product is something that goes with retail as opposed to wholesale conception?

A. It goes with both because—well, take, for example, a piece of heavy machinery that is used in a manufacturing plant—now, the maker of that machinery is usually obligated to make repairs, go down to that plant any time that machine fails, they are supposed to have repair parts available to cover that.

Q. The maker of it?

A. Yes.

Q. You mean to tell me the Ford Motor Company will give you a nickel's worth of service on your automobile?

A. No, I am talking about capital machinery in a plant.

Q. Well, Doctor, we are not talking about any capital machinery anywhere in this lawsuit. We are talking about articles that are customarily consumed, consumer goods.

1212 Now, please stick to consumer goods—the line of business. So please stick to consumer goods in the line of business.

Is it or not true that continuing service of the product is more usually referable to retail than to wholesale transactions?

Now, please give me your answer, and I hope we are——

You know that, you don't have to think, Doctor.

A. It depends on the way we use "consumer", the sense—in any situation—now, which way do you want me to use it?

Q. Who furnishes the servicing for tires, the manufacturer or the seller?

A. The immediate seller.

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Q. The immediate seller?

A. Yes, sir.

Q. Who furnishes the servicing on a radio?

A. Well, now, that is a case where sometimes the manufacturer does it through some service center that he will establish.

Q. Well, now, can you imagine of any circumstance where the distributor—the wholesaler—the man who holds the warehousing stock and has no connection what-  
1213 ever with the ultimate purchaser, is called upon as a customary thing to give service on the product?

A. To that man—to the wholesaler?

Q. To anybody on the product. There is no privity of contract between the purchaser and the distributor; the privity of contract is between the purchaser and the person who sold it to him, isn't it?

A. Well, I don't know what you mean by the term "privity of contract".

Q. Well, I am sorry. That is some of this jibberish we lawyers use.

But you told me what a sale was. I thought you knew what privity of contract was.

A. I told you that in a marketing sense, not legal.

Q. Let's talk about this just a minute. This drop shipment business you mentioned, you don't mean to tell me that the person who furnishes the goods to the customer in a drop shipment relation sustains the relation to the seller, do you?

A. Yes, sir, I do say that.

Q. You mean to say that if I go down to the Vaiden depot, which is perhaps the preeminent drop shipment warehouse here in Memphis, and I present an order  
1214 on the warehouse stock for one Norge washing machine, and I pick that thing up and take it with me, and take it down to Hushpuckena, Mississippi, and

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take it down and sell it, that the Vaiden Warehouse Company has sold me that?

A. Well, if they have it on consignment.

Q. Well, this is a warehouse—a public warehouse. They are holding this. It belongs to some other firm and they are holding it for this firm on some arrangement previously agreed on. They deliver the goods to you. That would not be, of course, a sale, sir, would it?

A. Considering how the drop shipment is usually used, the ones I knew, it has been.

Q. According to you—according to what the law is—assume by the question a hard-hearted situation, any situation other than yourself.

A. Yes, sir.

Q. Let's take this question, then. If a national account customer comes to Steepleton and presents an order for two tires, who has sold the man the tires?

A. The General Tire Company.

Q. Not Steepleton Tire Company?

A. That is right.

1215 Q. And Steepleton does not have to collect the sales tax, does he?

A. No, sir.

\* \* \* \* \*

1217

**DR. JOHN R. MOORE,**

having been first duly sworn, testified as follows:

**Direct Exam**      A,

By Mr. Tincher:

Q. Will you state your name, please, sir, and your place of residence?

A. John R. Moore, 5208 Pinnacle Lane, Knoxville, Tennessee.

Q. The University of Tennessee is located at Knoxville. Are you on the staff at the University?

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A. Yes, sir.

Q. In what position or what department, please?

A. I am a professor of economics.

Q. And what—

A. (Continuing) In the Department of Economics, professor of Economics.

Q. What subjects do you teach, Dr. Moore?

A. I am principally involved in teaching managerial economics, which is directed, of course, to undergraduate students, and a course in economics on the graduate level.

Q. How long have you been on the staff of the University of Tennessee?

A. For nine years.

1218 Q. What academic degrees do you hold, please?

A. I have a Bachelor's degree from Colgate University; Master's Degree and Doctorate from Cornell University.

Q. I understand you have also done graduate work at Harvard University Graduate School of Business, is that correct?

A. Yes, sir. I spent a year in '59—

Mr. Burch: If Your Honor please, Mr. Tincher has passed me a biographical sketch of this gentleman, and to save a lot of reading, we will just put it in the record.

Mr. Tincher: Thank you.

Mr. Burch: —If he tells us the biographical sketch is correct.

Q. This biographical sketch consisting of two sheets, Dr. Moore, does that set forth in summary form your educational training and your experience?

A. Yes, sir, it does.

Mr. Tincher: I wish to offer this in evidence as Plaintiff's Exhibit number 15.

(Thereupon said document was accordingly marked as

*Testimony of Dr. John R. Moore*

Plaintiff's Exhibit 15, and same will be found among the exhibits in the cause.)

1219 Q. To elaborate just a bit further on your qualifications, Dr. Moore, have you appeared or participated in any hearings before a committee of the United States Senate?

A. Yes, sir, I have.

Q. What did those hearings relate to that you appeared?

A. I was called as one of the five expert witnesses by Senator Kefauver's Subcommittee on Monopoly—Anti-trust Monopoly—to testify in the opening session of his investigation on administered prices.

Q. Well, now, if I understood you correctly, you in recent years have concentrated your studies and research and teaching in the field of business managerial economics; is that correct?

A. That is right, sir. We refer to our work in this area as managerial economics. And at the present time I am preparing a textbook in the area of managerial economics.

Q. And, if I recall correctly, you have set forth on your biographical data the name of a book on economics which you have authored and which was recently published; is that correct?

A. That is right. The book was published just this May, a text book on economics.

1220 Q. Yes. And you collaborated with——?

A. That is correct, with some other members of our staff.

Q. Now, are you familiar—, on the basis of your knowledge and research in the economic field and in other areas you have mentioned, are you familiar with accepted definitions of the term "retail" as used by leading authorities in the fields of economics and marketing?

*Testimony of Dr. John R. Moore*

A. Yes, sir, I believe that I am.

Q. You have listened to a considerable amount of testimony by witnesses in the trial of this case to the effect that all sales of automotive tires to those who purchased the tires for use rather than for resale are retail sales, have you not?

A. Yes, sir, I have.

Q. On the basis of your knowledge and experience in the field of business and economics, will you state whether or not such a classification is a valid one?

A. As I understand the testimony presented here, the definitions employed by the witnesses would not accord with my definition, certainly of retail and wholesale classifications.

Q. With reference to the usage of certain witnesses  
1221 in this case that automotive—that in the automotive  
tire industry the only sales that are considered to  
be wholesale sales are sales of merchandise for the purposes of resale, do you agree or disagree with that definition?

A. No, sir, I don't. That is a very narrow definition and meaning of wholesale, and I don't believe it is one that is generally accepted.

Q. And you have heard testimony to the effect that all sales of automotive tires to consumers or users are retail sales.

Do you agree or disagree with those classifications?

A. No, I do not agree with that classification—this classification as far as form being too broad in its scope.

Q. Yes. Would you explain the reasons upon which you would narrow such a classification and the considerations that go into proper classification of sales to consumers and users?

A. Yes. In the first place, I believe that retail sales are

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generally classified as sales to the ultimate consumer, not sales to anyone who might use the product.

By ultimate consumer we generally mean the final business consumer—the person who uses the product for  
1222 his own personal enjoyment.

In connection with the sales—say, a sale to one who will incorporate that product in their own product or their own service, we don't regard those as retail sales.

On the other hand, a wholesale sale would include certainly sales for resale, but would also include sales to industrial distributors, to—I should say, to consumers or professional users of the product.

Q. Would you be able to cite a few authorities in the field of economics and marketing who support your position in that regard?

A. Well, I believe that almost any of the standard texts in the field of marketing will define the terms as I have defined them. Furthermore, you will find the definition in the Marketing Handbook to be in accordance with the definition that I have given. And I believe my definition would also accord with the Standard Industrial Classification Manual definition of Retailing and Wholesaling.

Q. Some reference was made in Dr. Leigh's testimony yesterday about the Standard Industrial Classification Manual.

Can you say whether or not that manual is in common  
1223 usage in business and industry generally and whether its definitions are accepted in business and industry?

A. Well, to the best of my knowledge it is widely used, and I certainly use it frequently and regard it as an authoritative source of classification definition.

Q. In the business and industrial field of distribution, it is not at all unusual to find in this area between the manufacturer at the one end, and the consumer of eco-



*Testimony of Dr. John R. Moore*

nomie goods at the other end, firms which occupy a dual role and who sell merchandise both at wholesale and at retail?

A. It certainly is. As a matter of fact, it is my understanding that this is precisely the way that the tire industry has developed.

As I understand it, in the tire industry thirty or forty years ago—perhaps then forty years ago—thirty years ago—you would find few middlemen between the manufacturer and the dealer. Subsequent developments led to gasoline establishments. That is one of the functions of a retailer of automobile tires, and with the absence of a wholesaler between the distributor and the independent dealer, the independent dealers, with a part of their 1224 business being taken away by this newly created distribution outlet, began to move backward in the distribution channel and became primarily—at least partially wholesalers in the sense of selling the industrial and commercial user.

I believe, as a matter of fact, Dr. Leigh makes this point in his chapter with Mr. Beckman that the tire dealer has become a semi-wholesaler of tires rather than a retailer of passenger car tires.

Q. Yes, sir. Your answer, Dr. Moore, leads me to think that I may have mis-stated the question, I intended to ask, or that you misunderstood.

As I recall, I asked you whether or not it is unusual, and your answer indicated to me—

A. Oh.

Q. (Continuing) And your answer indicated you construed my question to be whether or not it is common.

A. I thought you said usual.

Q. Your answer would be it is usual?

A. That is right.

Q. Between the manufacturer and the consumer?

*Testimony of Dr. John R. Moore*

A. That is right.

Q. The firms which occupy a dual role, distributing both at wholesale and at retail?

A. That is right.

1225 Q. Dr. Moore, would there be situations, Dr. Moore, in which identical goods might be sold by the same dealer or distributor, in one transaction to a member of the general public for personal or family consumption, and in the next transaction similar goods to another purchaser not for resale for a non-personal use?

A. Certainly.

Q. Would you comment briefly on the nature and significance of those two types of sales?

A. Well, I think this fits into the definitions that I have already given. If the sale is being made to a person who is buying for purposes of his own personal use and enjoyment, the consumer, I should say, or householder, it would be considered to be a retail sale. If the sale is being made to someone who is then going to resell the product or person who is then going to incorporate that product into a product which he plans to sell later on, then this would be considered a wholesale sale.

And when I say incorporate the product into part of a product, I don't mean necessarily in a physical sense. For example, if tires are sold to a factory and the factory puts these tires on its trucks and uses them in the  
1226 process of distribution, then we would regard it as a wholesale sale, sir, because of the tire being incorporated into the product or the price of the distributed product.

Q. Would the same analogy be true as applied to a company which dealt not in a product but in a service, such as transporting merchandise for other people?

A. That is correct. If the buyer plans to add value to

*Testimony of Dr. John R. Moore*

the product before he sells it to the ultimate consumer, then this would not be a retail sale.

Q. And from what you have said, do I correctly infer that in modern-day business it is usual to find a business carrying on simultaneously both wholesale and retail?

A. Well, it certainly isn't uncommon in my experience.

Q. That would be done in present day occurrence?

A. Yes, sir.

Q. Usual in the business field?

A. Yes, sir.

Q. Now, Dr. Moore, I want to ask you now to assume certain facts that I will try to state at this time for the purpose of answering a number of questions.

Will you assume that a company operates a fleet of ten or more trucks in its business of transporting merchandise, from time to time it buys from the defendant in 1227 this action, Steepleton General Tire Company, a portion of the tires that it needs for use in operating its trucks.

How would you classify the sales of such tires by the defendant as to whether they are retail sales or not?

A. Well, I would classify them as non-retail sales. My first inclination might be to classify them as industrial or commercial sales.

Q. Would that comport with the way they are classified in the field of managerial economics?

A. Yes, sir, I think so. But normally I would like to—for my purposes, at least, I would like to make a sharper breakdown than simply retail or wholesale. But I would regard it as a commercial sales, I believe,—industrial sale.

Q. Now, with reference to the standard accepted definitions there as set forth,—for example, the definitions contained in the Standard Industrial Classification and by the Association of Marketing, if I recall it correctly, what classification would they bear by those definitions?

*Testimony of Dr. John R. Moore*

A. Well, if you are simply classifying transactions as either retail or wholesale, they would be in the 1228 wholesale classification. The seller under those circumstances I would regard as industrial distributor, and an industrial distributor is a sub-category of a whole-sale function.

Q. Would it be possible for such an industrial distributor to be engaged simultaneously in making sales of tires and tubes and other automotive accessories at retail to members of the general public?

A. Yes, it certainly is possible in the real world for this to be the case. Unfortunately, the activities of the business man are not confined to the classifications that may be set up by ivory tower economists or marketing specialists.

Q. Did you find that in your studies marketing literature and research have taken into account the dual role that is presently being carried on by the distributors in transactions of this type?

A. Yes, I think the most recent work on the subject is Robert Buzzell's book, "Value Added by Industrial Distributors." And he points out in the book the industrial distributor may very well sell to the ultimate consumer as part of his business transaction as well.

Q. In addition to sales to industrial or commercial?

A. In addition to sales to industrial or commercial.

1229 Q. I believe Dr. Leigh yesterday there—Dr. Leigh yesterday mentioned Dr. Buzzell.

You named a book by Doctor—is it Buzzell?

A. Dr. Buzzell, yes.

Q. Does that book bear out and support your position with reference to the fact that these sales to industrial and commercial users are wholesale sales or at least non-retail sales?

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A. That is right. He regards the industrial distributor as a wholesaler.

Q. Going back, sir, and to the hypothetical position I posed where the sales were made to a business operating ten or more trucks, would your answer be the same if this business were operating five or more trucks and at the same time five or more passenger cars were being used in the business?

A. Yes, I think my answer would be the same for classification purposes. It depends upon the purpose for which the purchase is made.

Q. Would your answer be the same without regard to the quantity of tires purchased at any one time for such use?

A. Yes. I don't believe the quantity makes a bit of difference.

1230 Q. Do you know whether in the normal course of events such a business establishment would, even if buying a small unit quantity, in a period of time normally purchase in excess of quantities which the ordinary individual would purchase for his own consumption?

A. Well, that question was a little more involved than I followed. Could you restate it?

Q. I think I need to restate it because I am not clear just what I said myself.

With reference to the purchases of tires by the customer we have assumed, this business operating trucks or trucks and passenger cars in the business, would your answer be the same if that purchaser, instead of buying in large quantities at any one time for use in the business, purchased in small lots only?

A. Yes, it would be the same; the answer would be the same.

Q. Then I went beyond that, and perhaps I went too

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far. You can clarify this if you think it needs any clarification.

Do you find in the usual course of business that the customer who is buying tires for use on its trucks and cars in a given period of time will buy more such  
1231 tires than an ordinary individual for his own personal use?

A. I am sure that that is common.

Q. Now, would I be correct in assuming that if I had used, instead of a trucking company as the example, if I had used, say, a bakery, or a laundry, or a sand and gravel company, or a contractor, or a construction company as the example, that these purchases for use in the business would fall into the same category?

A. That is correct.

Q. With respect to the question of whether the sales of tires such as I have described would be retail or not, would your answer be any different if the customer were a county governmental unit, or a municipality, or a county school district?

A. No, it would not.

Q. It would still fall in the category of being a whole-sale sale?

A. That is correct.

Q. Dr. Moore, you heard testimony in the case by Mr. Steepleton and Mrs. Lauderdale regarding national account transactions which are carried on by the defendant, Steepleton General Tire Company.

1232 Based upon that testimony, can you express an opinion as to whether such transactions constitute sales of merchandise by Steepleton General Tire Company?

A. Yes, I would regard them as sales. I think the matter of national account sales is a little bit more complicated than has been indicated in the testimony that I have heard so far. As an economist, I would regard the

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national account transaction as involving a number of separate transactions.

As I understand it, when the tires are delivered to Steepleton General Tire Company, there is an exchange of value. He receives the tires and he either pays for those tires or is expected to pay for the tires. So there is a transaction at that moment of time and it would be recorded by an accountant as such.

When the national account customer comes in into the Steepleton store to secure delivery of his tires and the tires are placed on the vehicle, I would assume that there is a second transaction taking place, a transaction between Steepleton General Tire and the General Tire & Rubber Company in effect is receiving the tire back to General Tire & Rubber.

And then I would regard as a third transaction is taking place when the national account customer in fact pays his bill, pays for the tires to the General Tire & Rubber Company.

So, from an accounting or economic standpoint there is not one transaction taking place when the national account sales occur; there are three—perhaps four transactions occurring, each one of them having economic significance.

Q. For the purpose of determining annual dollar volume by the company of sales of goods and services, would the transfer of this merchandise by Steepleton General Tire Company to the national account customer, plus the commission which is paid Steepleton General Tire Company for handling the transaction, be included in the gross dollar volume of sales?

A. I would think it should be included, yes.

Q. Would that be the type of business accounting you would expect to be followed in the business world?

A. That is right.

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Q. In one of your previous answers, Dr. Moore, you developed to some small degree about what I understand to be the history in which the distribution of tires has developed over the period of years.

1234 A. That is correct.

Q. Would the fact that dealers and manufacturers and the trade association in the tire industry that have over a period of years fallen into a practice of calling all these sales which are made to users as retail sales, that only wholesale sales are those which are made for purposes of resale,—would that practice change the economic reality with reference to the correct basis for classifying such transactions?

A. I don't believe so. And again, I think it is a little more complicated than that. From what I have read and from what I have heard here, it seems to me that the industry does normally classify sales not just as retail or wholesale, but normally classify—or very frequently there may be classified in three categories: Tire sales which are analogous to wholesale sales. Commercial sales, which I would call wholesale sales. And finally, retail sales, which category I would agree involves retail sales.

Q. And, naturally, commercial sales which you have described, I understand from your previous testimony, would be classified in the field of business and managerial economics as wholesale rather than retail?

1235 A. That is correct.

Q. And then would you say that the fact that the tire industry and the tire dealers association would classify sales to fleet operators for use in the business as retail sales would be—would actually not change the fact that they are other than retail sales?

A. That is correct. There may be some reason for this classification, but it certainly does not accord with common sense, just to my view.



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Q. And with common usage?

A. And with common usage.

Q. With reference to a possible reason for such a classification in the tire industry, could you draw an analogy from the field of the Tennessee Sales Tax Law and regulations?

A. Well, I think the point has been made in here that these transactions are retail transactions—that is, a sale not for resale are retail transactions because this accords with the definition in the sales tax law. But I don't believe that anyone would argue that the sales tax is intended to be exclusively retail sales tax.

As a matter of fact, I participated in legislative 1236 council study on industrial development a few years ago, and this was a matter of quite heated discussion and exchange of views, with the members of the Legislature realizing that the tax, for example, on coal being sold to a manufacturing establishment might very well put that industry at a disadvantage in locating in the State of Tennessee. And so they were at least investigating the business of re-defining the sales tax to include only retail sales in the sense of sales to the ultimate consumer.

Q. Do you recall any considerations that were expressed for leaving the retail sales tax law with the definition that it presently has?

A. Well, as I understand it, the major factor was the financial one, that as presently defined it brings in more money than it would with some other definition of sales.

Q. Now, in the law—the Tennessee sales tax law—do you find that it covers an area not only of sales for ultimate consumption and personal or household use, but those sales which will represent the last transaction in the distribution system, and thus the only—or at least

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the last opportunity for the transfer of those goods to be taxed?

1237 A. No, I would not agree with that because, again, when the factory buys tires and places on those distribution trucks, these tires wear out in the normal process of deliveries, and I would expect the factory to recover the price of the tires in the price of the bread sold to the consumer.

So it really isn't the last area of taxation. It is a way of double taxation of this particular transaction.

Q. But it is regarded, as I understand it, as not only the sales tax but the use tax, is that true?

A. I think that is the way it is, the rationalization of the tax, yes.

Mr. Tinch: I have no further questions at this time.

**Cross-Examination,**

By Mr. Burch:

Q. Dr. Moore, you have spoken very interestingly of the academic and classical concept of the differences between various forms of marketing.

There is quite a body of learned support in favor of what you say, isn't there?

A. I hope so.

1238 Q. In addition, the authors that you have mentioned of Beckman and Ingle, their works are substantially the same, are they not?

A. That is correct.

Q. And also of Rowe Alderson?

A. I haven't examined his work.

Q. Beckman and Ingle—

A. That is right.

Q. (Continuing) —are the outstanding exponents of the same theory you have enunciated so well?

A. That is right.

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Q. Did you know that there were a number of reported cases in which Beckman and Ingle's work had been specifically repudiated by the courts as bearing on this question?

A. I understand that their testimony has been questioned.

Q. Now, as a matter of fact, the views of the classical economists—they vary from time to time and there are vogues of thought and belief in economic development, are there not?

A. I am not sure that I understand what you mean by classical economics.

Q. Well, the economic theory that is generally used  
1239 by economists in one day or in one generation will not be used the next decade or the next generation, will it, frequently?

A. Well, I can think of a good many theories which Adam Smith enunciated in 1776 which we still adhere to.

Q. Will you answer my question, Doctor. Then we will talk about Adam Smith.

A. I can't answer the question, but I say—Will you restate the question, perhaps?

Q. Isn't it true that there are many economic theories that have been in general acceptance, that with the passage of time their acceptance is lost?

A. I would agree that there are some economic theories.

Q. Well, we will start with Adam Smith, who was a great exponent of laissez faire, and you tell me, Doctor, whether laissez faire is an accepted theory or not?

A. Laissez faire is not a theory. It is a policy derived from certain assumptions of theories and definitions. Laissez faire is not a theory, though.

Q. Are you telling me the general belief of economists in the eighteenth century of the importance of laissez

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faire is accepted by the economists of the twentieth century?

1240 A. I would say that when you talk about the belief in laissez faire, you are not talking about economic theory.

Q. Well, let me get to something else, then. This may be one whom you can classify.

You know the works of Ricardo and Malthus?

A. Yes, sir.

Q. The Malthus theory had a great effect on thinking today?

A. Yes.

Q. Do you believe it now?

A. Yes, I think it quite applicable.

Q. Oh, it is?

A. And I think it is quite generally understood that it is. Just let's say——

Q. You know then that Malthus—according to his belief the population increases in geometric progression while the supply of food increases in arithmetic progression.

Can you state what is the basis of that theory?

A. You have stated the Malthusian theory.

Q. This is the Malthus theory, the population increases with relation to the increase in the food supply?

A. Yes, Mr. Malthus found that as only a doctrine, and I believe there is a great deal of common knowledge  
1241 of validity, if you examine the condition of Asia, at least.

Q. I am asking if the trend of modern-day economics is associated with the Malthusian theory?

A. I accept the basic theory of the Malthusian doctrine as having some consideration about the present day population explosion, then.

Q. And further, on the Bohm-Bawek, on the basis of

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that, or take Keynes' view, do you feel both of which are up to date trends as you say they are?

A. Depends on the aspect you are talking about.

Q. That is right, you agree with some and don't agree with others.

That is the argument of counsel in this lawsuit. No, I am not concerned with the classical view or the theoretical view. I am concerned in this lawsuit with what is wholesale and what is retail and recognized in the tire industry.

Now, in my subsequent questions, will you limit yourself to that?

A. May I ask a question for clarification purposes?

Q. At this time you may, sir.

A. When you say "in the tire industry," that 1242 means "by the tire industry"?

Q. By the tire industry?

A. Yes, sir.

Q. Now, let's say in the tire industry, recognized in the tire industry. That is the language of the statute.

Now, one of the answers you gave my friend Mr. Tinchler here—, and he phrased the question this way himself—he said, "Would the fact that a practice is regarded as so-and-so in the tire industry affect the essential economics so as to make it different from what you have said?"

And you said of course that it would not.

Did you realize that the statutes of the United States state not what are the economic facts of the practice in the tire industry, but what is recognized—recognized—not what is, but what is recognized?

Do you make that distinction?

A. Yes, sir.

Q. Very well. Now, do you profess to the Court to be sufficiently learned and sufficiently expert to testify as to

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what recognition is given these practices in the tire industry?

A. I think I have a fair understanding of what the  
1243 tire industry does in these matters.

Q. I didn't ask you about what it does. I asked you about recognition of practices in the tire industry.

Now, do you know about ordinary recognition of these practices, or can you qualify as an expert, or shall we take up the time?

A. I have listened to a great deal of testimony about this, and I have read a number of depositions by experts in the tire industry or people who are engaged in the tire industry.

Q. Do you have any knowledge about practices in the tire industry except what you have heard while you sat as a witness for whom the rule was waived in this courtroom and the depositions that were taken that you have read?

A. I have read other material about the tire industry.

Q. Has it been published by people who were members of the tire industry?

A. Some of it by people who were members of the tire industry.

Q. Just answer the question. Basically, what type of material did you have?

A. I answered your question there about—well, as  
1244 testified, some of this has been in connection with the depositions which have been prepared.

Q. Now, look, Dr. Moore, we have been here a long time, and I don't want to put a lot of time and I don't want to embarrass you, and I don't want to take the Court's time.

Do you consider that you are sufficiently expert on recognition in the tire industry to state an opinion about it?

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A. Well, I will have to take what you might call an academic point of view. I have been studying economics and the managerial aspect of economics for a long time. One of the purposes of that study is to derive general principles which are universally applicable. I believe that I have done that. And I believe that I have made enough study of the tire industry so that I can see the relationship between the general principles and the applications to the tire industry.

Q. Do you recognize that different industries recognized different concepts as to the distinction between wholesaling and retailing?

A. I believe that I would say that different industries at times use a different concept of wholesaling and retailing, yes.

1245 Q. Now, what industries would your definition of wholesaling and retailing not have validity for?

A. I think they would be valid for any industry.

Q. Well, now Doctor, you just told me that different industries have different conceptions of wholesaling and retailing—recognize different criteria for wholesaling and retailing.

A. I believe that I —

Q. Now, which ones can you apply —

A. I believe I said that they use different concepts.

Q. Well, which industries use different concepts from the ones which you say are proper?

A. Well, I believe that you would probably find different concepts by a member of the oil industry, for example, because of a different marketing structure.

Q. And what other industries?

A. I believe in the building materials industry there is a different usage.

Q. Come on, some more. Now, what is the distinction in the oil industry?

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A. Between retail and wholesale?

Mr. Burch: Right.

A. Well, this depends on—in the oil industry more  
1246 as to the way you define it in the way of purchaser  
in the industry.

Q. The way you define it. Does that have validity—  
the way you define it?

A. I don't believe that it has overriding validity. No,  
I don't believe that it has validity—period.

Q. Now, you believe that no matter how the oil industry  
defines its practice, your theory has validity in the prac-  
tice, as well?

A. No, I believe it is a little more complicated. Those  
sales cover classes of resale—wholesale. Or wholesale sales  
cover further subdivisions.

Q. Who is the best judge of how the division should  
be made, the theoretical economist or the person engaged  
in the industry?

A. I believe such person in the industry is so closely  
associated he would not be able to think clearly.

Q. Do you know that Congress happened to have given  
authority to define it to the person in the industry, not the  
academic theory?

A. I have read the interpretative bulletin. I haven't  
read the law itself.

Mr. Burch: Is that—

(Discussion between counsel.)

1247 Mr. Burch: I am sorry for the interruption.

A. I have read the interpretative bulletin, I haven't  
read the law itself. It says the interpretation shall be  
that interpretation in the industry. But "by the indus-  
try"—nothing to indicate the consideration that due weight  
should be given the interpretation there, and so forth.

Q. Now, you have got the interpretative bulletin before  
you?



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A. I have the September 2, 1961, version.

Q. Is that the one you read? Which one did you read?

A. I wasn't reading any. I just gave you my view of what the bulletin said.

Q. But the one you have got that you have been looking at—what is the date of it? Now, let's look at one—let's have the date.

A. This one is September 2, 1961.

Q. All right, what is the other one?

A. The other one is January first, I guess, 1960, including amendments up to January 31, 1961.

Q. Now, which one have you been looking at in making your opinions?

A. The September 2, 1961, version.

1248 Q. Now, let's go to the other one, which is the one that has to do with this case—which the Government says has to do with it.

Now, follow me, if you please, and let's go down to—first, look at page 33, sales to fleet accounts.

Excuse me. Have you got it?

A. Yes, sir.

Q. (Reading) "Sales to fleet accounts at wholesale prices: As used in this section, a 'fleet discount' is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale. If the establishment makes no sales of passenger car tires for resale, the wholesale price of such tires will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating 10 or more commercial vehicles."

Now, will you please tell me any source, any reference, any published material, or any testimony, or any knowledge that you have of any source coming from anyone in the tire industry that recognize that classification?

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A. The only person that I—the only thing that I  
1249 have read that indicated this classification is Dr.  
Leigh's article on Marketing Channels.

Q. Well, Dr. Leigh—?

A. He is not in the tire industry, no.

Q. Not in the tire industry?

A. He is closer to it than I am, but he is not in it.

Q. Is that all you can cite?

A. That is the only thing I can cite.

Q. And were you advised that Dr. Leigh testified under  
oath from this stand, subject to rigorous cross-examina-  
tion, that it was true that was the classical view or  
theoretical view, the economic and correct view that is  
recognized and practiced in each industry is diametrically  
opposed to it?

A. No, sir, I don't know what Dr. Leigh testified.

Q. Well, do you know of any authority to support the  
contention you have mentioned?

A. No.

Q. Now, Doctor, I think I know the answer to this,  
but I want to get it in the record.

You never have been employed in the tire industry,  
have you?

A. No, sir.

1250 Q. You have never conducted or attended seminars  
in the tire industry?

A. No.

Q. Never written any articles on tire industry subjects,  
have you?

A. No.

Q. You have never been employed as a consultant by  
any of the companies in the tire industry?

A. No.

Q. You don't subscribe to any publications on the tire  
industry?

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A. No, sir.

Q. Are you familiar with the idiom of the tire industry?

A. I believe so, in some aspects at least.

Q. What is an OB take-off?

A. No, I don't know it.

Q. What is the MTO?

A. I don't know that.

Q. So when you see price schedules for that, you don't even know what they mean, then?

A. That is right.

Q. If I told you MTO was manufacturer's take-off, you would recognize that is a very important concept to 1251 a merchant in the tire industry, would you not?

A. Yes.

Q. Yet if you had seen it, you would not know what it meant, would you?

A. That is right.

Q. Do you identify a national account sale as having anything to do with drop shipment?

A. I think to a sense it is analogous to a drop shipment, yes.

Q. Your definition of national account sales and the way you have described the four economic concepts that enter into it, do you harmonize those four economic concepts with a drop shipment?

A. Well, I think we are looking at it from two different points of view, when we are talking about the transaction way of thinking and the drop shipment.

The drop shipment is simply something that describes a method of delivery rather than a sale in which the transaction is——

Q. So there are two sides to look at this?

A. If by sides you mean——

Q. Two viewpoints.

A. ——aspects. Not viewpoint, but aspects of the 1252 transaction.

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Q. Well, if the drop shipment, it is a drop shipment all around?

A. Well, drop shipment all around for it—well, I am talking about whether you might account for it in the accounting sense of the transaction, whether be drop shipment transaction or some other kind of transaction. I would say that the transaction does bear very definite resemblance to a drop shipment transaction.

Q. So if an accountant in setting up the books set it up as a drop shipment, will it actually be a drop shipment, or is it an accounting technique? You wouldn't challenge that, would you?

A. If in fact he accounted for all the aspects of the transaction I have indicated.

Q. So if you call it a drop shipment, or if you call it a sale to General Tire Company in this particular case, or if you call it not a sale because no sales tax was entered or collected, either one would be technically correct from the accounting standpoint, would it not?

A. Well, from the accounting standpoint is of course a record of the aspects of the transaction. He should, for example, certainly record the fact that initially  
1253 it is a sale by General Tire Company to the tire distributor.

Q. Well, of course, that was done in this case, as you know.

But, now, in your opinion, should that go in the annual volume of business or should it be entered in his sales?

A. Yes, I think it should.

Q. And you think—

A. (Continuing) I also believe—Well, go ahead.

Q. You would think that even though the testimony is the universal practice—the standard method of accounting in the tire industry is to the contrary?

A. Yes, I believe I would. I would think there that is the way it should be done.

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Q. You would realize, too, that what you say should be done and recognized in the tire industry is different?

A. What is done in the tire industry is different, yes.

Q. So there is a difference there between what you say theoretically ought to be done and what is recognized as ought to be done in the tire industry. There is that difference, isn't there?

A. Assuming that they do what they recognize ought to be done, there is that difference, yes, sir.

1254 Q. Well, we all must go by the testimony. And since there is no other, I ask you to assume that the standard, universal accounting practice in the tire industry is not to treat those as sales, and they are charged back against the bonus rendition for sales.

If that is correct in the testimony, you would admit there is a difference between the view you are telling us—

A. That is right.

Q. (Continuing) —and what is recognized in the tire industry?

A. That is right.

The Court: Suppose we have a ten minute recess, gentlemen.

(Recess.)

Q. Dr. Moore, to be as brief as I can, as I understand the substance of your testimony is that sales to other than the ultimate consumers—sales to people other than individuals who personally use or enjoy the sold article—should be classified as wholesale?

A. That is correct.

Q. I take it that you would disagree with this statement:

1255 “The services of hotels, restaurants, repair garages, filling stations and the like, whether rendered to private householders or to business customers, will

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be retail so long as they are regarded as retail services in such trade."

You wouldn't agree with that, would you?

A. I would say that there ought to be a distinction, that is right.

Q. You wouldn't agree that a sale to a repair garage who repaired—the sale to a repair garage—to a commercial account—that would be wholesale?

A. That would be a wholesale transaction.

Q. Now, would it affect your view any if I told you I was quoting from the Congressional Record, from Mr. Lucas who made that statement at the time he introduced the 1949 Amendment?

A. Would it change my opinion as to how it should be classified?

Mr. Burch: Yes.

A. No.

Q. So either you are wrong or Mr. Lucas is wrong?

A. I don't know if it is a matter of being wrong; it is a matter of having different definitions.

Q. Well, you are right. I am wrong. It is a matter of having different definitions?

1256 A. That is right.

Q. You don't have to say who is right or wrong.

"It means that any sale or service to a private consumer, businessman, who does not purchase to resell, or a farmer, will have to be treated by the Administrator and courts as a retail sale or service so long as such sale or service is recognized in the particular industry as a retail sale or service.

"Thus a sale by a farm implement dealer of farm machinery to the farmer will be retail irrespective of the fact that in some cases farm machinery may be sold to the farmer at a discount, if the sale is regarded as retail in such industry.

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“Likewise, the services of hotels, restaurants, repair garages, filling stations and the like, whether rendered to private householders or to business customers, are retail so long as they are regarded as retail services in such trade.

“No longer will it be possible for the Administrator to rule, as he has under the present law—that if an automobile dealer sells a truck to the local butcher, bakery, or grocer the sale is not retail, but if he sells a passenger car to a private consumer the sale  
1257 is retail. These and other like discriminatory interpretations of the Administrator are eliminated under the Amendment. Under the Amendment the courts would decide the question of what sales or services are recognized as retail in the particular industry.”

Now, you are in disagreement with that statement, aren't you?

A. Yes, I think I am. From what I have read, I think I know quite well the traditional definition in the tire industry are not simply retail or wholesale. It is retail, commercial and dealer sales. And it is simply a question of whether you are going to allocate that class composed of sales—who may be the industrial—whether you are going to regard it retail or wholesale.

Q. Now, an assumption that every witness on the stand—every single one testified that in the tire industry the component of commercial sales is regarded as retail—now, assuming that, would you be in agreement with the consensus on that point, you would be individually opposed to it?

A. I would want to know whether these were—did you say these were to people in the industry?

Q. Every one in industry there, everyone who testified.

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1258 A. I would say necessarily, to answer it then.

Q. You would say necessarily to answer it then?

A. Necessarily.

Q. And yet you state that you have no information about the tire industry except what you have heard from the witnesses in this case and what you have read in the depositions?

A. That is right. But I am very puzzled about some of that testimony.

Q. Well, in all the depositions that you read, did you find a deposition of a single individual in the tire industry who did not say that consumers sales in that industry were recognized as retail?

Did you find a single one?

A. I don't believe that they remarked on that particular question. But I think it is quite true that all consumer sales would be classified by the people in the industry who have presented testimony in deposition that it should be retail—classified as a retail sale.

Q. Now, I want to get away from the industry a minute, and I want to get back to generalities.

Under your theory, any sale except for the enjoyment and pleasure and personal consumption of the purchaser would be wholesale, wouldn't it?

1259 A. That is correct.

Q. So a farmer who buys a tractor, even if he just has one tractor, that would be wholesale?

A. Should be.

Q. Should be wholesale. Now, if a man buys something for his own personal enjoyment, that you say is retail, but if he buys it as equipment to perform his business or his profession and is using it, that is wholesale?

A. If it is used in his business or profession, yes.

Q. Then it is wholesale?



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A. That is right.

Q. Well, let's just see how ridiculous that is. Say you go down—where do you live?

A. Knoxville.

Q. Say you go down to the bookstore there on Gay Street—and I don't assume that doctors of philosophy do this sort of thing, it is just lawyers like me and Mr. Ray—but suppose you go there and buy yourself a real sexy novel there you are going to entertain yourself with, that is a retail sale, isn't it?

A. Yes.

Q. But in the same book store, in the same transaction, you buy some book to help you in your teaching, like something you brought down with you, that is a whole-  
1260 sale, isn't it?

A. That is correct.

Q. Now, you say that makes sense and could be administered by anybody short of God?

A. No, I don't claim that makes sense. I say that is the way the transaction ought to be handled. I obviously recognize there is a matter of some kinds of set up—administrative rules that might differ from these definitions, but I think we should begin with the definitions rather than extracting the definitions from them.

Q. Do you, of course, know that that is what Congress actually attempted to do, exactly what you have suggested, that this recognizes that they cannot characterize everything theoretically and you must have arbitrary administrative rules, and prescribed that if it is recognized in the industry that is what we will treat it, no matter what it may be theoretically?

They recognized the need for something—

A. That is right. I think the fleet account situation represents this so really. You would not treat a sale—sale of

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tires for people who only have one truck as a fleet  
1261 account sale. That is a practical exception—the  
general purpose.

Q. You say something. But that is not what Congress  
said. Congress said the industry ought to classify it. You  
say the Administrator ought to be allowed to classify it,  
don't you?

A. No, I don't know who ought to classify this. This  
is not an area in which I have a professional opinion.

Q. Well, from what you have learned, you know that  
the way the industry classifies it and the way the interpre-  
tative bulletin classified it is different, isn't it?

A. Yes, sir.

\* \* \* \* \*

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**MISS SARAH GINSBERG,**

having been first duly sworn, testified as follows:

**Direct Examination.**

By Mr. Tincher:

Q. Will you state your name, please?

A. Sarah Ginsberg.

Q. Give your place of residence and by whom you are  
employed, Miss Ginsberg.

A. I am employed—I live in Washington, D. C., and I  
am employed by the Wage and Hour and Public Contracts  
Divisions of the United States Department of Labor.

Q. And for how long have you been employed in the De-  
partment of Labor?

A. Since November, 1938.

Q. Will you speak up, hold your voice up, please?

A. Since November, 1938.

Q. What is your position there at present?

A. I am Chief of Administrative Analysis and Litigation  
Assistance Section of the Research and Statistics Branch.

*Testimony of Miss Sarah Ginsberg*

Q. Do you have here a duplicate statement of your qualifications and experience, Miss Ginsberg?

A. Yes, that is what this is.

Q. I have already handed Mr. Burch a copy of this 1263 statement. And without reading it, would you simply summarize briefly the work which you have done in recent years in the field of research and economics?

A. Well, this goes back to 1930 to '36, when I was head of the Research Department of Atlanta University School of Social Work, and taught Statistics, Principles and Methods of Research, Techniques of Community Surveys, and Labor Legislation, and conducted community surveys.

From March, 1936, to June, 1936, I was assistant city supervisor in charge of field work in Atlanta, Georgia, for the Urban Survey of Consumers Purchases—

Mr. Burch: Excuse me, Miss Ginsberg.

This is quite lengthy, and it will be agreeable to me, Mr. Tincher, to put it in the record and treat it as read, as an exhibit.

Q. May we enter that as an exhibit to your testimony?

A. Yes.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 16, and same will be found among the exhibits in the cause.)

Mr. Tincher: Exhibit Number 16.

Q. Miss Ginsberg, in your position as an economist 1264 and as Chief of the Section of Administrative Analysis and Litigation Assistance and Statistics, have you compiled from the various accepted authorities some definitions of the terms "wholesale" and "retail"?

A. Yes, I have. I have been doing that for many years.

Q. I hand you here some sheets that you prepared and ask you if you can read from those sheets the definition of

*Testimony of Miss Sarah Ginsberg*

wholesale trade and retail trade as set forth in the Standard Industrial Classification Manual.

A. Yes, sir.

The Court: Now, I have no objection to Miss Ginsberg reading this. But I want to know what it is for—the standpoint of whether it is within the tire industry. I want to identify it. Don't know whether it has something to do with the witness—

A. The Standard Industrial Classification Manual definition of wholesale trade and retail trade—

The Court: I am sorry to be so thickheaded.

But I don't know what the Standard Industrial Classification Manual is. I wish somebody would tell me.

A. I could. That contains the definitions—

1265 Mr. Tinch: Just a minute, Miss Ginsberg.

Dr. Leigh testified to the Standard Industrial Classification. And it was identified also in some of the deposition testimony which the defendants have filed and was referred to by the previous witness, Dr. Moore, as having general acceptance and usage in the business and economic fields.

The Court: I repeat, I would like for somebody to tell me who publishes it.

If it is published by the Government, what department. I would like to know that.

Miss Ginsberg, can you tell us the answer?

A. Yes, I have got it all written out here.

The Standard Industrial Classification was developed for use—

Well, it is published by the Bureau of the Budget, or Office of Printing of the United States.

Well, the Standard Industrial Classification was developed for use in the classification of establishments by type of activity in which engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis

*Testimony of Miss Sarah Ginsberg*

of data relating to establishments; and for promoting uniformity and comparability in the presentation of statistical data collected by various agencies of the United States Government, State agencies, trade associations, and private research organizations.

The Classification is intended to cover the entire field of economic activities—

The Court: I have got it. I understand now. Go ahead.

Q. Would you now, Miss Ginsberg, read the definitions of "wholesale trade" and "retail trade" as contained in the Standard Industrial Classification Manual?

A. Yes, sir. (Reading:)

"This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional, or professional users; or to other wholesalers; or acting as agents in buying merchandise for or selling merchandise to such persons or companies. The principal types of establishments included are: (1) merchant wholesalers—wholesalers who take title to the goods they sell such as wholesale merchants or jobbers, industrial distributors, voluntary group wholesalers, exporters, importers, cash-and-carry  
1267 wholesalers, drop shippers, wagon distributors, retailer cooperative warehouses, terminal elevators, and cooperative buying associations; (2) sales branches and sales offices (but not retail stores) maintained by manufacturing or mining enterprises apart from their plants or mines for the purpose of marketing their products; (3) agents, merchandise or commodity brokers, and commission merchants; (4) petroleum bulk stations; and (5) assemblers, buyers, and associations engaged in the cooperative marketing of farm products.

"The chief functions of establishments included in wholesale trade are selling goods to trading establishments,

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or to industrial, commercial, institutional, and professional users; and bringing buyer and seller together.”

Mr. Burch: If Your Honor please, there is a good deal of this, and I have no objection whatever to letting Miss Ginsberg identify it and Mr. Tincher read whatever parts he thinks relevant, or treat it as all read, or have the right to—

Q. I believe that ends the definition of wholesale trade, doesn't it, Miss Ginsberg?

A. No, no, sir; there is a little bit more.

Q. Well, would you read the rest of it?

A. O. K. (Reading:)

“ . . . and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit physically assembling, sorting, and grading goods in large lots, breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion, such as advertising and label designing.”

Q. All right, now, from the same Standard Classification Manual, would you read the definition of “retail trade”?

A. Yes, sir. (Reading:)

“Retail trade includes establishments engaged in selling merchandise for personal, household, or farm consumption, and rendering services incidental to the sale of the goods. In general, retail establishments are classified by kind of business according to the principal lines of commodities sold (groceries, hardware, etc.), or the usual trade designation (drug store, cigar store, etc.).

1269 “Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells; the establish-

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ment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customers for personal, household or farm use. Not all of these characteristics need be present and some are modified by trade practice.

“Buying of goods for resale to the consumer is a characteristic of retail trade establishments that particularly distinguishes them from the agricultural and extractive industries. For example, farmers who sell only their own produce at or from the point of production are not classified as retailers.

“Processing incidental or subordinate to selling often is conducted at retail stores. For example, restaurants prepare meals, and feed stores grind feed.

Retail establishments of manufacturing concerns are included in retail trade.

“For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. For example, retail lumber yards are included in Retail Trade despite the fact that a high proportion of their sales are made to contractors; and establishments selling feed, fertilizer, machinery, etc., to farmers are also included in Retail Trade. Chain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the industrial activity carried on by such retail stores.

“Establishments engaged in selling to the general public, from displayed merchandise, products such as typewriters, stationery, or gasoline, are classified in retail trade even though such products may not be used for personal or household consumption. However, establish-



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ments that sell these products only to institutional  
1271 or industrial users and establishments that sell  
similar merchandise for use exclusively by business  
establishments are not classified in Retail Trade.”

Mr. Tincher: For the aid of the reporter and for whatever other use it might have, I will offer this in as an exhibit to the testimony of Miss Ginsberg.

The Court: For the aid of the reporter or the judge?

Mr. Tincher: Certainly Your Honor may use it.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 17, and same will be found among the exhibits in the cause.)

Q. Miss Ginsberg, I shall not ask you to read or state any additional definitions, but I will hand you a sheet here which you have prepared and which I believe contains excerpts of definitions taken from the Census of Business, is that correct?

A. That is correct.

Q. Are the definitions contained there and the definitions  
1272 which are found in the publication of the  
United States Business Census organization consistent with the definitions you have read from the Standard Industrial Classification Manual?

A. Yes, they are. The census—the Bureau of Census uses the SIC in all its definitions.

Q. Then will you make the sheet of paper you are now holding an exhibit to your testimony?

Mr. Burch: Which one is it, just so I can follow it?  
(Counsel confer.)

Mr. Burch: Let me see it so I can follow it.

Mr. Ray: That will be Plaintiff's Exhibit 18.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 18, and same will be found among the exhibits in the cause.)

Q. Miss Ginsberg, have you also compiled definitions



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relating to "wholesale" and "retail" and "ultimate consumer" from other publications of the United States Government?

A. Yes.

Q. I will ask you, Miss Ginsberg, to make that as Exhibit 19.

Mr. Burch: O. K. I have it.

Q. (Continuing) The collection of definitions which you have identified.

And for clarification, is there also included with this collection of definitions some which are headed some concepts of wholesaling and retailing in marketing literature?

A. Yes, sir.

Mr. Tischer: Those sheets are offered as Plaintiff's Collective Exhibit 19.

(Thereupon said documents were accordingly marked as Plaintiff's Collective Exhibit 19, and same will be found among the exhibits in the cause.)

Q. Dr. Leigh in his testimony yesterday referred to Dr. Rowe Alderson as an author who has discussed distribution and retailing operations.

Could you tell the Court what you have found Dr. Rowe Alderson wrote about this subject?

A. I can.

This is from Rowe Alderson, writing on the subject—it is Rowe Alderson in his book called "Marketing," which was published in 1949, by checking this 1274 revised edition—'49, page 121.

That says:

"The vending of goods to industrial or commercial houses and to institutional buyers for use in their enterprises is not a retail operation nor are the firms which operate in this type of activity retailers."

Q. Thank you. Mr. Burch in examining some witness referred to National Recovery Administration definitions.

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I will hand you two sheets and ask you if you have compiled on those sheets NRA Code definitions relating to tire manufacturers and the retail tire and battery trade.

A. That is what this is.

Mr. Tincher: I wish to make this Plaintiff's Exhibit 20.

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 20, and same will be found among the exhibits in the cause.)

Q. Miss Ginsberg, before we go further, have you found any definitions in any of the sources that you have referred to so far that are inconsistent with the definitions of "wholesale trade" and "retail trade" as 1275 stated by you from the Standard Industrial Classification Manual?

A. The codes are slightly different, but they say the same thing.

Q. In other words, the definitions in their meaning as you interpret them are consistent?

A. Yes, that is right.

Q. Miss Ginsberg, in the years immediately following the 1949 amendments to the Fair Labor Standards Act, did you prepare any economic studies relating to the automotive tire industry?

A. Yes, sir, I prepared material for use of the Divisions on the automotive tire industry.

Q. Did you prepare during the same period economic studies in the motor fuel, tires, batteries, and accessories field?

A. Yes, sir.

Q. Will you tell us whether you made any studies for use by members of the Administrator's staff of the Department of Labor or members of the Solicitor's staff to ascertain what classes of sales are recognized as retail sales or services in the automotive tire industry?

A. Yes, sir, I did.

*Testimony of Miss Sarah Ginsberg*

1276 Q. And did you compile any material for such special purpose in the work of making a determination to be published as to what is recognized as retail sales in the automotive tire industry?

A. Yes, sir, I did.

Q. And are you familiar with the determination as was finally adopted and published in the interpretative bulletin, Part 779 Code of Federal Regulations—

A. Yes.

Q. (Continuing) —That has been filed as Exhibit 6 in this case?

A. Yes, sir, I am familiar.

Q. In your study and preparation of material for use of the staff and others in the department, did you examine materials that were submitted by the National Tire Dealers and Retreaders Association and the tire manufacturers which they submitted to support their contention that all sales to tire users as distinguished from resellers were considered by the tire industry to be retail sales?

A. Yes, sir, I did, some of them.

Q. Well, will you state, if you will, what factors caused the representatives of the Administrator's  
1277 staff and the Administrator not to accept the contentions of the tire association—the tire dealers association and the tire industry people in this regard?

A. Well, one of the tests was that the legislative history indicated that it was the responsibility of the Administrator to make the determination, and that the industry's definitions—what the industry's definitions were in the particular industry's definition of what was a retail sale in their industry—in other words, we weren't to accept the contention of the industry and let them make their own definition or decide for themselves what was at retail and what was at wholesale.

Mr. Tinker: All right.

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A. (Continuing) It was the responsibility of the Administrator, and he was to make thorough studies in all—all of the aspects of this industry before he made the determination.

Q. All right. In that regard, did you examine and prepare materials relating to the Congressional intent, the legislative history relating to the 1949 amendments in the particular area of what is recognized as retail sales in the industry?

A. Yes, sir.

1278 Q. I hand you some papers stapled together, which is headed "The Holland Amendment."

Will you state whether or not that is compiled from the Congressional Record?

A. Yes, sir.

Q. As an indication of what the Congressional intent was with reference to this question of what is recognized as retail in a particular industry?

A. Yes, sir.

Mr. Tincher: I wish that to be marked, and it is offered in evidence as Plaintiff's Exhibit 21, with the heading "Holland Amendment."

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 21, and same will be found among the exhibits in the cause.)

Q. Without asking you to read or summarize what is on that sheet, Miss Ginsberg, did you find any mention in this Congressional history of the '49 amendments—any mention of fleet sales or how they were to be treated?

Mr. Burch: What is the question—of what sales?

1279 Mr. Tincher: Fleet sales.

Q. (Continuing) Nothing in what I just handed you?

A. No, sir.

*Testimony of Miss Sarah Ginsberg*

Q. Is that in some other portion or collection of materials which you made?

A. Yes. I don't know whether you have it there or not.

Q. But, at any rate, it is a part of the Congressional Record which you made up—?

A. Yes.

Q. (Continuing) Or debates?

A. That is right. There is information there, a little information in which fleet sales are mentioned.

Mr. Mitchell: Did I understand her answer to be that the Congressional Record contained some discussion of how fleet sales are to be handled?

A. A little bit, yes, sir.

Mr. Mitchell: Is that the testimony?

A. A little bit, yes, sir.

Mr. Mitchell: It does contain it?

A. Yes, sir.

Mr. Mitchell: Could you designate whether that is in any of the material that has already come in?

1280 A. No, sir, it is not in there.

Mr. Burch: It would be very material.

Mr. Mitchell: If I might on that, Mr. Tinner, do you plan to offer whatever material Miss Ginsberg has in mind?

Mr. Tinner: We certainly will want to call it to the attention of the Court.

Mr. Mitchell: All right.

Mr. Tinner: But I believe Miss Ginsberg has not—among the materials we have here—has not excerpted that portion—

Mr. Mitchell: But you do plan to have it identified, so we will know?

Mr. Tinner: If she does not identify it, let's say we will

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show—you will have an opportunity to read it and try to answer it.

Q. Miss Ginsberg, do you know where you have the materials which you excerpted from the Congressional Record that would bear on this discussion of fleet sales?

A. I don't know whether I have it in the briefcase, or my office, or my hotel room. But I do have copies of it.

Let's see what I have in my miscellaneous material.

1281 (Witness checks documents.)

Here it is.

Q. Would you simply identify that portion of the Congressional Record——

Mr. Burch: May I see it, please?

Hand it all in there.

Mr. Ray: Do you have extra copies of this?

A. Yes.

Mr. Ray: Could we have them?

A. I don't know whether I have an extra copy here, but I shall look.

The Court: Let's see——.

Mr. Burch: By all means, let's have it there.

Q. Do you have a page there dated August 30, 1949?

A. Here it is.

Q. 95 Congressional Record?

A. Yes, here it is.

Mr. Mitchell: What page of the Congressional Record was that, Marvin?

Mr. Tinch: 12,497 continued. It came up with Mr. Pepper's question to Senator Holland.

I believe, then, for the purposes of clarification or  
1282 to help the court, I will ask that this excerpt from the Congressional Record be made exhibit—Plaintiff's Exhibit 22.

(Thereupon said document was accordingly marked as

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Plaintiff's Exhibit 22, and same will be found among the exhibits in the cause.)

Q. Now, I understand, Miss Ginsberg, that on the basis of the legislative history of the 1949 amendments, the Administrator, in arriving at the determination which was finally published in the bulletin as regards the automotive tire industry, took into account the materials that were submitted by the tire association and by the tire industry, and the Congressional intent as shown by the debates in Congress, and the accepted economic and marketing theories, is that correct?

A. That is correct.

Q. Now, would you state whether any analogous areas of marketing were considered in regard to a determination for the tire distributing industry? And, if so, what ones were considered?

A. Well, they studied the automobile industry—automobile trade, I mean, and the marketing of parts and accessories, batteries, and so forth.

1283 Q. Did you find in the economic studies you prepared that the marketing channels and practices with reference to automotive parts and accessories, batteries, and so forth, was similar to that of automotive tire distribution?

A. They were mostly similar. I don't remember if any differences offhand or not.

Q. Well, insofar as your studies were concerned, and did you study the system being used by the batteries and accessories and parts distribution industry?

A. Yes, sir.

Q. Did you find in that industry, namely, automobile parts, batteries and accessories, that there was any practice in the industry or any recognition in the industry that sales to fleet operators for business uses were retail sales?

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A. In the parts and accessories sales to business users and fleets were considered wholesale sales.

Q. Any recognition thereof that they were retail sales, or called retail sales?

A. No, sir.

Q. In the testimony of Dr. Moore this morning, some reference was made to the history by which the distribution of automotive tires developed over the years.  
1284 Did you prepare any study of the history of the automotive tire distribution, Miss Ginsberg?

A. Yes, sir, I did. This is a short history—relatively short history of the distribution of tires taken from various authentic sources.

Q. Did you, in preparing that and on the sheets there, and in all of those, put footnotes there to that identifying the source from which you obtained information?

A. Yes, sir, I did, I identified the source.

Mr. Tinch: I wish to make that Exhibit number 23. (Thereupon said document was accordingly marked as Plaintiff's Exhibit 23, and same will be found among the exhibits in the cause.)

Q. I wish you would briefly summarize that from memory or from your notes, Miss Ginsberg?

A. Then I have some notes which I wrote on it somewhere.

Q. I think the Court might like to hear this, a little more fuller exposition of how this use of the term "retail" in connection with distribution of tires to the users, fleet accounts, commercial accounts, and so forth—a little more full than Dr. Moore gave.

1285 Will you please—

A. The activities of the tire dealers have changed considerably over the years since the automobile first came into use, but the terminology of the industry has remained the same. Thus, the use of the term "retail"



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is now habitual rather than descriptive of the current activities of the tire and tube distributor.

Since the automobile came into use before the truck, the original replacement tires were sold to automobile owners. Replacement tires were first by bicycle and carriage shops, vulcanizers, bicycle repairmen, garages, general stores, hardware stores, and so forth.

Then, to insure that replacement tires would be available to all car owners, the tire manufacturers began franchising dealers. These dealers sold tires primarily to individual car owners, and were of course retailers.

After a while some of the larger dealers centrally located were franchised to sell to smaller dealers for retail. Thus they went into the wholesale business.

The truck did not come into general use until some time after the automobile. The first trucks were 1286 converted automobiles. The early truck tires were solid. About 1914 Goodyear began replacing solid tires with pneumatic tires, and later they were improved, making it possible to carry heavier loads. Truck tires were sold by the dealers of automobile tires. As heavier and more specialized tires were developed, the dealers also sold these. But at first the manufacturers made sales to large fleet owners. Later, the dealers began selling to fleet owners. Now the manufacturers are selling to national accounts and the dealers are also selling to fleet owners.

In the meanwhile, more and more automobile tires have come to be handled by a variety of dealers, not only garages, gasoline stations, automobile dealers, and auto repair shops, but also department stores, chain stores, discount houses and the big cooperative markets are selling automobile tires.

As a result, the large tire and tube dealers are concentrating on truck tires, all kinds of large, specialized

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industrial and commercial truck tires, sales to fleet owners and sales for resale. However, the industry continues to call these people retailers.

Q. As a result of—

Mr. Burch: What is the last, please, ma'am?

1287 A. The industry of course continues to call these people retailers.

Mr. Mitchell: Will you clarify whether that is the last thing you are quoting, or whether this is your own addition there?

A. The last that—the last addition there—?

Mr. Mitchell: The quote should be before—

A. I am not quoting anything. This is what I wrote as a summary of it all and it contains excerpts—contains, for instance, from the various sources which I mentioned.

Mr. Burch: Thank you. I understand.

Q. As a result of the practice which you have described that has developed over the years in the distribution of tires, have you found from your study of the literature and the discussions that there has developed a confusion in the tire distribution industry?

A. Yes, every once in a while—and this is one example I especially noted. This is found in a letter to the Honorable Aime J. Forand, Chairman of the Subcommittee on Excise Taxes, House Ways and Means Committee, Washington, D. C., dated November 20, 1956, which was printed in Part 2 of the report of the Hearings before a Subcommittee—

Mr. Burch: If Your Honor please, I don't object  
1288 to this, but I just—the latitude we are going—this is practically ten years after the amendment, and is hearsay, but put it in for what it is worth.

Mr. Tinch: I think it is very in point.

Mr. Burch: Put it in for what it is worth.

A. (Continuing) Well, in Part 2 of the report of the Hearings before a Subcommittee of The Select Commit-

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tee on Small Business of the U. S. Senate, 86th Congress, Second Session, on Dual Distribution in the Automotive Tire Industry, by R. H. Miner—signed R. H. Miner, Assistant Secretary—

Q. Just tell us what he said, please.

A. He said, "Our retail stores also sell to consumers as well as to other retailers."

Mr. Tinch: May we have that marked, and make it Exhibit 24?

(Thereupon said document was accordingly marked as Plaintiff's Exhibit 24, and same will be found among the exhibits in the cause.)

1289 Mr. Burch: Do you want that to go in?

Mr. Tinch: No, what she read here in this regard was simply to make as clearly as we could.

Mr. Burch: Is that compiled—? That is admitted I don't know what it is—the materiality is there, but anyway, we won't take up—

Mr. Tinch: It is simply in this regard which the defendant is claiming—

Mr. Ray: That is an exhibit, then?

Mr. Tinch: Yes, it is Exhibit number 24.

Mr. Mitchell: What? Exhibit number 24?

Mr. Tinch: Plaintiff Exhibit 24.

Q. And from Exhibit 24, this Mr. Miner, Assistant Secretary of the Goodyear Tire and Rubber Company, states:

"Our retail stores also sell to Consumers as well as to other retailers."

And you indicated that that testifies to you the confusion—

A. Yes.

Q. (Continuing) —which you found in other literature?

A. Correct.

. . . . .

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1291

**Cross-Examination,**

By Mr. Burch:

Q. Miss Ginsburg, in your background, you seem to be a lady that has a great sense of social responsibility, don't you?

A. Yes, sir.

Q. And you have always believed in the uplift and the betterment of the most numerous classes of society, haven't you?

A. That is right.

Q. Now, when this debate on the '49 amendment was before the Congress, the great antagonist for the—to the amendment was Senator Pepper. That was true, wasn't it?

A. One of them, yes, sir.

Q. Well, Senator Pepper was the most articulate and voluble against the amendment, wasn't he?

A. He talked against it, I believe, sir.

Q. You can pull, if you want, out and file with the Court the whole Congressional hearing, from which you quoted a very small part, but it does bear out my statement that Senator Pepper was one—or was the great—well, remained with the Solicitor or the Administrator and against the passage, isn't that right?

1292 A. He was by no means the only one. He was spokesman, but he was by no means the only one.

Q. That is what I want to ask. He was the spokesman, then?

A. That is right. But he was by no means the only one.

Q. And did you personally confer with Senator Pepper?

A. No, I never talked with Senator Pepper.

Q. You did not?

A. I never talked to Senator Pepper, never.

Q. Well, who was it from your office that was helping Senator Pepper at that time?

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A. I don't know if anybody from my office was helping Senator Pepper.

Q. Ma'am?

A. It is possible, but I never talked to Senator Pepper.

Q. Now, why is it that in making the excerpts of the Congressional debates from Mr. Lucas, the sponsor of the bill you did not bring us any from Senator Taft, did not bring us the colloquy of Mr. Holland?

A. Well, what I brought you was the argument on the floor. It is—there was a great deal of discussion on the floor and everybody gave their points of view. It was not only between Holland and Pepper. Lots of 1293 people talked. And they all gave their different points of view, which varied considerably.

And what I was trying to bring out here was that they tried to clarify the questions and answers. In other words, Senator Pepper asked Mr. Holland a question, then Mr. Holland answered.

In addition to that, there are excerpts there from Senator Holland entirely, in which he felt the clarification was necessary, himself submitting a list of questions and answers to the question.

And we sort of felt that that was clarifying the record, which was complex.

Q. Well, now, why is it in bringing us this material to clarify it in the mind of the Court that you only brought the colloquy with Senator Pepper, who was opposed to the passage of the amendment, broadening the exemption, and whose view was defeated by the Congress, why didn't you bring us the views of the sponsor who sponsored the bill?

Why didn't you bring us the views of the majority who passed it?

A. Well, I thought that this was not specific. This

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1294 was an attempt by the spokesman for the bill, Senator Holland, to explain what he meant. And that is what I brought there.

Q. And that the fact that Senator Pepper was making the point did not have anything to do with it?

A. I don't know—whoever would have asked him these questions, if he would have answered them this way.

Q. Would you agree with me this is fairly quoted from the Congressional Record? And I am going to read you—I will run along, I have got some extractions here.

Now, this is Senator Taft talking about Senator Pepper's position:

“On October eighteenth Senator Pepper submitted a statement expressing the views of a majority of the senate conferees as to the intention of the conference which prepared the conference reports on the Minimum Wage bill. It seems to me that this report was prepared in the first instance by the attorneys for the Wage-Hour Administration——”

Now, you weren't in on this?

A. No, sir. I am not an attorney.

Q. And you don't remember now who they were?

A. No, sir.

1295 Q. (Continuing reading) ——“in an effort on their part to retain jurisdiction in various field which the conference report clearly intended to take away from them. The Wage-Hour Administration for years has been trying to extend its jurisdiction beyond the field provided by Congress and is now trying to nullify the present Congressional action.

“The conference committee never considered this statement, or summary, nor was there ever any meeting of the Senate conferees to consider or discuss it. My own view is that the report and the act finally

*Testimony of Miss Sarah Ginsberg*

adopted speaks for itself. I am quite certain that the conclusions of the report submitted by the senior Senator from Florida as to the intentions of the conferees are incorrect in many important particulars, and that the report of the House Managers is closer to their actual intentions.

“Since——”

Taft was the majority leader at that time, do you recall?

A. Yes, sir.

1296 Q. (Continuing reading): “Since other individual views have been submitted, however, I have prepared a partial discussion of some of the points at issue and submit it herewith.

“Considered in its entirety the summary submitted by the senior Senator from Florida does not state what the amendments are intended to accomplish. Its approach is a negative one of pointing out what the amendments are not intended to accomplish. This is especially true with respect to those amendments which were introduced to limit the coverage of the Act as interpreted by the Administrator and the courts. For example, the retail and service establishment exemption adopted by the overwhelming vote of the Senate was intended to prevent the Administrator and the courts from asserting coverage over those retail and service businesses on the main streets of America which were never intended to be covered when the original Act was written in 1938.

“Likewise the conferees agreed to a redefinition of the term ‘produced’ intending to prevent extension of coverage.”

1297 And it refers to the Belo case.

Do you recall reading this?

A. Yes, sir, I think so.

Q. And do you remember in the Conference Report:

*Testimony of Miss Sarah Ginsberg*

"Under the new test, if the sales are made within the State in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the State to fill customers' orders or (c) are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce."

Now, I have got here about a twenty page excerpt that all bears upon the dates they changed the law as it existed before 1949, criticizing the efforts of the Administrator to extend his coverage and properly touching on the desire of Congress that in connection with the particular matters of retail exemption that the industry itself there should define what the practices were.

Do you recall reading all those in the extensive study from which we have got these excerpts from Senator Holland's speech you have given the Court?

1298 A. I don't recall reading anywhere that the industry itself was to be the final arbitrator of what was retail or wholesale in their industry. And what I quoted was the specific statement of Senator Holland to the effect that he did not think—and he being one of the sponsors and the spokesman—he himself is the sponsor, and what I quoted that the industry—he did not intend for the industry to decide for itself what was wholesale or retail.

Q. You don't recall the colloquy in which Senator Pepper has said exactly what you have said, that the industry could not be allowed to make its own set of rules, and Senator Taft came back and stated the majority rule on this very same question in which he says, "They are not making their rules. What their interpretation is as of this date is a matter of fact." You don't remember that?



*Testimony of Miss Sarah Ginsberg*

A. Not exactly.

Q. I am reading from 95 Congressional Record 12502:

“Under the third test, any sale or service to a private consumer, businessman who does not purchase to resell, or farmer will have to be treated by the Administrator and courts as a retail sale or service, so long as such 1299 sale or service is recognized in the particular industry as a retail sale or service.”

That is not the part I wanted to read.

Wait a minute. Here it is.

Mr. Ray: While you are looking, will you clarify this for me?

There are some materials where that conclusion he is making become part of the legislative history. In other words, here comes Senator Pepper with what his contentions are on the amendment—nothing more than an effort—been passed, anyhow. Then here comes Senator Taft along, Your Honor, to answer Senator Pepper's views there and makes a speech exactly contrary he is making to the other's. Is this part of the deal there, those two efforts or those concerning the statements—in commerce or not? Or what part—

Mr. Burch: Taft—

Mr. Ray: What part—

Q. 95 Congressional Record, 12956. Again, I ask you this:

“The ‘recognized in the particular industry’ test does not give industries the right to decide what is a 1300 retail sale for themselves. Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact.”

A. Well, as I said before, there was a great deal said in that record, and we went through to try to determine,

*Testimony of Miss Sarah Ginsberg*

and we thought that Senator Holland being the spokesman for it, so we finally handled—as questions and answers would have considerable meaning.

Q. Well, I believe we all agree that the law says—that finally passed—that what is retail is what is considered in the industry as retail?

A. But that question—but that was—the “recognized in the industry”, that is what the Senator Holland was specifically answering when——

Q. I didn't ask you anything about Senator Holland, just asked you if you agree with me that it is what the law that came out of all this debate——

A. Oh, yes, it says “recognized in the industry,” yes, sir.

Q. Now, you would admit that there is a very wide distinction recognized in many industries that there is a difference in what is retail and what is wholesale as it affects this industry, don't you?

1301 There is no standard, uniform test of wholesale or retail that is valid for all industries, is there?

A. Well, it might. For instance, some parts of marketing test definition holds for all industries, I think.

Q. You would think and contend, would you, that any sale of commodity that is not to be consumed and enjoyed by the purchaser, but is to be used by him in some further commercial transaction, according to your definition, in every industry would be a wholesale sale?

A. Not necessarily. I would not say that. Now, does the SIC definition say that?

Q. That is exactly what I was going to read. You realize that the Bureau of Census definition has been expressly repudiated in three cases, don't you?

A. No, I didn't know it. I don't know much about the law.

Q. But even in there now, and I am quoting correctly from it:

*Testimony of Miss Sarah Ginsberg*

“Not all these characteristics need be shown. And some are motivated by trade practice. For the most part establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. Establishments engaged in selling to the general public from displayed merchandise products as typewriters, stationery, or gasoline—or gasoline are classified as retail trade, even though such product may not be used for personal or household consumption.”

A. That is right. That is part of it.

Q. Now, Miss Ginsberg, as a person who had an important and authoritative and useful part in drafting the interpretative bulletin, I want you to tell me any individual or officer or official or employee or stockholder, even, in the tire industry who has written anything in the form of a letter to you personally even, or probably—or make a publication that sustained the classification of the Administrator?

A. I don't know anybody in the industry that has done that.

Q. So, although the law required the retail exemption to be accorded those establishments that in the industry were classified as retail, you cannot name me a single bit of information that has come to you from anybody in that industry that sustains the interpretative bulletin, can you?

A. The law does not say “by the industry”.

Q. I said “in”.

A. I take it the law says “in the industry” and—

Q. Let me re-define it to you.

A. (Continuing) And this is—

Q. Can you name me a single officer, director, stockholder, or employee engaged or occupied in the tire

*Plaintiff's Exhibit 7*

industry who has written a statement you can produce to substantiate the interpretative bulletin with reference to commercial accounts?

A. Well, it depends on how you interpret "in the industry". I might use that lingo "in the industry"—

Q. Now, Miss Ginsberg, it is getting close to dinner. And I said "in the industry". I define it as this. You just go along with me. Don't ask you to say I am right. Just follow my question.

Name an officer, director, stockholder, or employee—

A. No, sir.

Q. You cannot name a one?

A. I can't name one.

Mr. Burch: That is all I can ask now, please.

That is all, Your Honor.

\* \* \* \* \*

**PLAINTIFF'S EXHIBIT 7.**

1) Sales for Resale.....	58,395.00
2) National Account Sales (General Tire & Rubber Co.) .....	115,597.00
3) Sales of new Truck Tires to fleets known to have had 10 or more vehicles in 1960.....	110,981.00
Less 10% Tubes.....	11,098.00
	<hr/>
4) Sales of new Truck and Passenger Tires to Governments .....	47,159.00
5) Sales to City of Memphis (New Truck & Passenger Tires) .....	9,289.00
6) Recapping to fleet accounts at less than Retail .....	24,951.00
	<hr/> <hr/>
	353,373.00

*Plaintiff's Exhibit 8*

**PLAINTIFF'S EXHIBIT 8.**

Re: Goldberg v. Steepleton et al.

Civil No. 4344,

U. S. District Court, Western Dist., Tenn.

Answers to interrogatories 3-11, inclusive, served on or about November 5, 1961 on defendant by plaintiff, from workpapers of C. P. A. prepared under the direction of defendants' attorney furnished to plaintiff's attorney per agreement between counsel.

**Interrogatory #3.** Percentage of gross income derived from customers outside the state of Tennessee.

**Answer:** No record of income from customers outside of Tennessee is maintained by defendant, other than records supporting monthly Tennessee sales tax reports filed by defendant. No credit was claimed by defendant on its Tennessee Franchise, Excise tax reports for 1959 or subsequent years since sales made outside of Tennessee are far too insignificant to warrant a branch office or make additional special records economical.

**Interrogatory #4.** Percentage of tires recapped for sale by defendant as contrasted to number of customers' tires recapped by defendant and returned to customer.

**Answer:** Defendant keeps no record of number of tires recapped; defendant recaps few, if any, tires for sale.

**Interrogatory #5.** "Non-retail" sales (during 1960) by quarters, and the percentage such "non-retail" sales bore to total sales.

**Answer:** The defendant maintains no records captioned "non-retail" sales, nor does defendant know of any use

*Plaintiff's Exhibit 8*

of the term "non-retail" as a classification of sales in the tire industry. The only sales by defendant which are not retail sales are sales for resale. Defendant accepts the values of its sales for resale by quarters during 1960 shown in Col. 1 of Ex. 2 to the deposition of Micklish, the total of which is \$45,112.00, as accurate to an acceptable degree. The names and addresses of customers to whom defendant made such sales for resale during 1960 may be obtained from defendant's sales invoices by plaintiff.

**Interrogatory #6.** Gross income from sales and services.

**Answer:** Defendant's gross income during 1960, by quarters, from sales and services to its customers was as follows:

1st quarter.....	\$209,445.42
2nd quarter.....	242,660.70
3rd quarter.....	244,690.16
4th quarter.....	206,724.28

**Interrogatory #7.** Sales and service income by customer.

**Answer:** This duplication or accumulation of defendant's sales invoices for 1960 may be made by plaintiff.

**Interrogatory #8.** Sales, including services and new and recapped tires, by defendant to national accounts by quarters during 1960.

**Answer:** Recapping service by defendant during 1960, by quarters, for companies which then had national account status grossed the following amounts:

1st quarter.....	\$4,083.76
2nd quarter.....	4,299.17
3rd quarter.....	1,663.41
4th quarter.....	2,771.08

*Plaintiff's Exhibit 8*

The defendant makes no sales to national account customers.

Replacement of inventory values plus commissions earned for deliveries of new tires by defendant to national account customers of General Tire and Rubber Company by quarters during 1960 were:

1st quarter.....	\$28,306.16
2nd quarter.....	43,809.70
3rd quarter.....	29,490.25
4th quarter.....	11,318.02

No deliveries of recapped tires were so made.

**Interrogatory #9.** Sales of new or recapped tires and services during 1960, by quarters, to city, county and state governments.

**Answer:** No sales of recapped tires were made by defendant to customers in these categories.

Sales of new tires and recapping services by defendant to customers in these categories during 1960, by quarters, grossed the following amounts:

1st quarter.....	\$22,158.96
2nd quarter.....	25,142.10
3rd quarter.....	27,038.92
4th quarter.....	26,093.04

In addition to the above the following sales were made to the City of Memphis, some or all of which were made pursuant to formal invitation to bid:

1st quarter.....	\$ 93.75
2nd quarter.....	95.65
3rd quarter.....	786.74
4th quarter.....	402.44

**Interrogatory #10.** Sales or other income received during 1960 from fleet accounts of ten vehicles or more:

*Plaintiff's Exhibit 13*

**Answer:** Defendant's records do not and could not reasonably reflect the numbers of vehicles either owned or leased or operated by its customers. It would be impracticable and extremely poor customer relations, if not impossible, for defendant to ascertain, record or maintain records reflecting the number of vehicles operated by its customers at any given time or over any period of time.

**Interrogatory #11.** Sales and service income received from taxi companies by defendant during 1960.

**Answer:** Defendant had only two taxi companies as customers during 1960. As shown by Col. 7 on Ex. 2 to the deposition of Micklish, defendant's gross receipts from these two customers during 1960 constituted less than 1% of defendant's gross income. Defendant maintains no separate records on taxi companies and, while not accepting the values in Col. 7 on the said exhibit, agrees that such sales are inconsequential in volume as shown by same.

**PLAINTIFF'S EXHIBIT 13.**

**"Commercial Sales" Distinguished From  
"Regular Retail."**

In the October 1952 issue of **The Journal of Marketing**, published by the American Marketing Association, in an article entitled "The Quantity Limit Rule and the Rubber Tire Industry," Warren W. Leigh states that "all substantial tire dealers do three types of business." He describes each of these three types of business, and in doing so differentiates between "commercial sales" and "regular retail."

**"a. Wholesale.** The larger the sales volume of a dealer, the larger is the wholesale portion of his business. A dealer in the volume brackets above \$100,000



*Plaintiff's Exhibit 13*

normally sells 20 to 50 percent of his volume at whole-sale.<sup>1</sup>

“b. **Commercial** sales refer to sales to trucking companies and national accounts. Large dealers to a great extent depend on commercial business for their volume. In urban centers particularly, these dealers concentrate almost entirely on sales to other dealers or to truck accounts and are playing a lesser and lesser part in the over-the-counter sales of passenger tires.

“c. **Regular retail** embraces sales to individual consumers who usually own one or two vehicles” (pp. 147-148).

hands of factory-owned stores or dealers in the cities, who secured special discounts from manufacturers and passed them on to large buyers. Now the trend is reversed and the manufacturer is again taking over volume sales” (p. 100).

Warren W. Leigh, in his chapter on “Automotive Tires” in *Marketing Channels for Manufactured Products*, edited by Richard M. Clewett, points out that gasoline service stations, parts and accessory dealers, motor vehicle dealers, automotive repair shops, farm equipment dealers, department stores, chain stores and mail order houses have all gone into the retail tire distribution business. As a result of this, the tire dealer has gone heavily into selling to commercial accounts and to all these types of retail dealers. Thus he is no longer primarily in the retail business. But he is still being referred to as retail dealer. Mr. Leigh states:

“The character of tire dealers has altered as they adapted themselves to the new competition and to

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<sup>1</sup> Such a dealer carries a large inventory of various types and sizes of trucks, passenger, and perhaps, farm equipment tires. He in turn travels one or more salesmen to sell sub-dealer accounts within the area. In addition, many small outlets such as garages, oil stations, etc., use him as a pick-up source of supply.

*Plaintiff's Exhibit 13*

changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the other hand, the drift of passenger tire purchasing from downtown stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services" (pp. 131-132).

Sales to Over-the-Counter Buyers Distinguished From  
Sales to the Commercial Market by Volume  
and Discounts.

Marketing Channels for Manufactured Products, edited by Richard M. Clewett, Ph. D. (Chairman, Department of Marketing, School of Commerce, Northwestern University), Richard D. Irwin, Inc., Homewood, Illinois, 1954; Chapter 5—Automotive Tires, by Warren W. Leigh (Dean of College of Business Administration, and Professor of Business Administration, University of Akron).

"The largest volume of sales is made to replace the worn out tires on cars and trucks. This constitutes the renewal or replacement market, which is really a dual market. The largest segment of replacement buyers are individual owners of automobiles and operators of from one to five trucks. These purchasers buy tires as their vehicles need them. Owners of from 5 to 1,000 trucks constitute the so-called commercial market.

*Plaintiff's Exhibit 17*

These purchasers buy several to hundreds of tires at a time, and tire costs are a definite item to them. Not only the volume purchased but the discounts allowed and the services required set this group apart from over-the-counter buyers" (p. 122).

**PLAINTIFF'S EXHIBIT 17.**

**Classification of Tire Dealers in the Standard Industrial Classification Manual.**

The Standard Industrial Classification Manual<sup>1</sup> includes tire and tube dealers under major Group 50, Wholesale Trade; Group No. 501, Motor Vehicles and Automotive Equipment; Industry No. 5014, Tires and Tubes, which is defined as:

"Establishments primarily engaged in the wholesale distribution of rubber tires and tubes for passenger and commercial vehicles" (p. 147).

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<sup>1</sup> U. S. Bureau of the Budget, Standard Industrial Classification Manual, 1957. The Standard Industrial Classification was developed for use in the classification of establishments by type of activity in which engaged; for purposes of facilitating the collection, tabulation, presentation, and analysis of data relating to establishments; and for promoting uniformity and comparability in the presentation of statistical data collected by various agencies of the United States Government, State agencies, trade associations, and private research organizations.

The Classification is intended to cover the entire field of economic activities: agriculture, forestry, and fisheries; mining; construction; manufacturing; transportation, communication, electric, gas, and sanitary services; wholesale and retail trade; finance, insurance, and real estate, services; and government.

The Classification was prepared by the Technical Committee on Standard Industrial Classification, assisted by a number of special committees of experts in various fields of business. The work of the Technical Committee was carried on under the sponsorship and general supervision of the Office of Statistical Standards of the Bureau of the Budget, Executive Office of the President.

In preparing the Classification, the Technical Committee was guided by the general principle that the classification should conform to the existing structure of American industry.

In preparing the classification, the Technical Committee received assistance from the Advisory Council on Federal Reports, an organization of businessmen who act as advisers to the Bureau of the Budget. The Advisory Council aided in the establishment of 26 committees of industry representatives to review specific sections of the Manual.

*Plaintiff's Exhibit 17*

No industry entitled tire and tube dealers is listed in the SIC Manual under Retail Trade. Dealers selling tires at retail are included in the category entitled Tire, Battery and Accessory Dealers.

Tire, Battery and Accessory Dealers are classified in Retail Trade under Major Group 55, Automotive Dealers and Gasoline Service Stations; Group No. 553 and Industry No. 5531, Tire, Battery and Accessory dealers, which are defined as:

“Establishments primarily engaged in the retail sale of automotive tires, batteries, and other automobile parts and accessories. Such establishments frequently have facilities for tire recapping and vulcanizing . . .”  
(p. 160).

The SIC Manual defined Wholesale Trade and Retail Trade as follows:

**Wholesale Trade:**

“This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional, or professional users; or to other wholesalers; or acting as agents in buying merchandise for or selling merchandise to such persons or companies. The principal types of establishments included are: (1) merchant wholesalers—wholesalers who take title to the goods they sell such as wholesale merchants or jobbers, industrial distributors, voluntary group wholesalers, exporters, importers, cash-and-carry wholesalers, drop shippers, wagon distributors, retailer cooperative warehouses, terminal elevators, and cooperative buying associations; (2) sales branches and sales offices (but not retail stores) maintained by manufacturing or mining enterprises apart from their plants or mines

*Plaintiff's Exhibit 17*

for the purpose of marketing their products; (3) agents, merchandise or commodity brokers, and commission merchants; (4) petroleum bulk stations; and (5) assemblers, buyers, and associations engaged in the cooperative marketing of farm products.

“The chief functions of establishments included in wholesale trade are selling goods to trading establishments, **or to industrial, commercial, institutional and professional users**; and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion, such as advertising and label designing” (p. 147). (Emphasis not in original.)

**Retail Trade:**

“Retail Trade includes establishments engaged in selling merchandise for personal, household or farm consumption, and rendering services incidental to the sale of the goods. In general, retail establishments are classified by kind of business according to the principal lines of commodities sold (groceries, hardware, etc.), or the usual trade designation (drug store, cigar store, etc.). Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells, the establishment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customers for personal, household, or farm use. Not all of these characteristics

*Plaintiff's Exhibit 17*

need be present and some are modified by trade practice.

“Buying of goods for resale to the consumer is a characteristic of retail trade establishments that particularly distinguishes them from the agricultural and extractive industries. For example, farmers who sell only their own produce at or from the point of production are not classified as retailers.

“Processing incidental or subordinate to selling often is conducted at retail stores. For example, restaurants prepare meals and feed stores grind feed. Retail establishments of manufacturing concerns are included in retail trade.

“For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. For example, retail lumber yards are included in Retail Trade despite the fact that a high proportion of their sales are made to contractors; and establishments selling feed, fertilizer, machinery, etc., to farmers are also included in Retail Trade. Chain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the industrial activity carried on by such retail stores.

“Establishments engaged in selling to the general public, from displayed merchandise, products such as typewriters, stationery, or gasoline, are classified in retail trade even though such products may not be used for personal or household consumption. However, establishments that sell these products only to institutional or industrial users and establishments that sell similar merchandise for use exclusively by business establishments are not classified in Retail Trade” (p. 153).

*Plaintiff's Exhibit 18*

**PLAINTIFF'S EXHIBIT 18.**

Classification of Tire Dealers in the 1958 Census  
of Business.

**Wholesale Trade<sup>1</sup>**

“Wholesale trade, as defined in major group 50 of the 1957 edition of the SIC Manual, and as covered in the 1958 Census includes establishments primarily engaged in selling merchandise to retailers; to institutional, industrial, commercial and professional users; or to other wholesalers; or in negotiating as agents in buying merchandise for or selling merchandise to such persons or companies” (1958 Census of Business, Wholesale Trade, United States Summary, p. 1-103).

“Motor Vehicles, Automotive Equipment (SIC 501)—Establishments primarily engaged in the wholesale distribution of new and used passenger automobiles and other vehicles, automotive parts and accessories, equipment for filling stations and garages, and rubber tires and tubes for passenger and commercial vehicles” (Same, p. 1-103).

“Tires and tubes (SIC 5014)—Establishments primarily engaged in the wholesale distribution of rubber tires and tubes for passenger and commercial vehicles” (Same, p. 1-103).

**Retail Trade<sup>2</sup>**

“Retail trade, as defined in major groups 52 through 59 of the 1958 Census, includes establishments primarily engaged in selling merchandise to personal, household, and

<sup>1</sup> U. S. Census of Business, 1958, Vol. III, Wholesale Trade, Summary Statistics.

<sup>2</sup> U. S. Census of Business, 1958, Vol. I, Retail Trade Summary Statistics.



*Plaintiff's Exhibit 19*

farm users" (1958 Census of Business, Retail Trade, United States Summary, p. 1-117).

"Automotive Dealers (SIC Major Group 55, Except 554—Gasoline Service Stations) **Note:** This group does not include establishments primarily engaged in selling trucks and motorized industrial equipment. Such establishments are included in the Wholesale Trade portion of the Census of Business" (Same, p. 1-119).

This section includes:

- Passenger car dealers, franchised (SIC 551).
- Passenger car dealers, non-franchised (SIC 552).
- Tire, battery, accessory dealers (SIC 553).
- Aircraft, boat, motorcycle dealers (Part of SIC 559).
- Household trailer dealers (Part of SIC 559).
- Other automotive dealers (Part of SIC 559).

"Tire, battery, accessory dealers (SIC 553)—Establishments primarily selling new automobile tires, batteries, automobile seat covers and automobile parts and accessories" (Same, p. 1-119).

**PLAINTIFF'S EXHIBIT 19.**

Federal Government Definitions of "Wholesale"  
and "Retail."

**Definitions of "Wholesale."**

"This division includes establishments or places of business primarily engaged in selling merchandise to retailers; to industrial, commercial, institutional or professional users; or to other wholesalers; or acting as agents in buying merchandise for or selling merchandise to such persons or companies. . . .

"The chief functions of establishments included in wholesale trade are selling goods to trading establishments, or



*Plaintiff's Exhibit 19*

to industrial, commercial, institutional, and professional users; and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit; physically assembling, sorting, and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion, such as advertising and label designing." (Executive Office of the President, U. S. Bureau of the Budget, *Standard Industrial Classification Manual*, 1957, p. 147.)

"Wholesale Trade as defined in the **Standard Industrial Classification Manual**, and as covered in the 1954 Census, includes establishments or places of business primarily engaged in selling merchandise directly to retailers; to industrial, commercial, institutional or professional users; or to other wholesalers; or acting as agents in buying merchandise for, or selling merchandise to, such persons or companies." (U. S. Census of Business, 1954, Vol. IV, *Wholesale Trade—Area Statistics*, p. 1.)

"**Sale at wholesale and wholesaler.** Sale at wholesale means a sale by a person who buys a commodity and resells it, without substantially changing its form, or who supplies a service, to an industrial or commercial user, or to any person other than the ultimate consumer. A seller who in the regular course of business makes sales at wholesale is a wholesaler." (U. S. Economic Stabilization Agency, *General Ceiling Price Regulations*, Approved: January 26, 1951, p. 8.)

"'Sale at wholesale' means a sale by a person who receives delivery of a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer." (U. S. Office of Price Administration,

*Plaintiff's Exhibit 19*

the General Maximum Price Regulation, Bulletin No. 1, April 28, 1942, p. 12.)

“For the purpose of this Code, a ‘wholesaler’ or ‘distributor’ shall be defined as any individual, partnership, association, corporation, or other firm, or a definitely organized division thereof, definitely organized to render and rendering a general distribution service, which buys and maintains at his or its place of business a stock of the lines of merchandise which it distributes; and which through salesmen, advertising, and/or sales-promotion devices, sells to retailers and/or institutional, commercial, and/or industrial users; but which does not sell in significant amounts to ultimate consumers.

“**Ultimate Consumer.** The term ‘ultimate consumer’ as used herein is defined as a purchaser for home and personal use, and not for use or consumption in trade or business or by institutions.” (National Recovery Administration, Codes of Fair Competition as Approved, Approved Code No. 201, Code of Fair Competition for the Wholesaling or Distributing Trade, as approved on January 12, 1934, p. 72.)

**Definitions of “Retail.”**

“Retail Trade includes establishments engaged in selling merchandise for personal, household, or farm consumption, and rendering services incidental to the sale of the goods. . . . Some of the important characteristics of retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells; the establishment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customers for per-

*Plaintiff's Exhibit 19*

sonal, household, or farm use. Not all of these characteristics need be present and some are modified by trade practice.

\* \* \*

“For the most part, establishments engaged in retail trade sell merchandise to the general public for personal or household consumption. Certain exceptions to this general rule are made necessary by trade practices. For example, retail lumber yards are included in Retail Trade despite the fact that a high proportion of their sales are made to contractors; and establishments selling feed, fertilizer, machinery, etc., to farmers are also included in Retail Trade. Chain store warehouses are considered auxiliary to the retail establishment served and are classified on the basis of the industrial activity carried on by such retail stores.

“Establishments engaged in selling to the general public, from displayed merchandise, products such as typewriters, stationery, or gasoline, are classified in retail trade even though such products may not be used for personal or household consumption. However, establishments that sell these products only to institutional or industrial users and establishments that sell similar merchandise for use exclusively by business establishments are not classified in Retail Trade.” (Executive Office of the President, U. S. Bureau of the Budget, *Standard Industrial Classification Manual*, 1957, p. 153.)

“Retail Trade, as defined in the **Standard Industrial Classification Manual**, and as covered in the 1954 Census of Business, includes establishments primarily engaged in selling merchandise directly to personal, household and farm users.” (U. S. Census of Business, 1954, Vol. II, Retail Trade—Area Statistics, p. 1.)

*Plaintiff's Exhibit 19*

**“Sale at retail and retailer.** Sale at retail means a sale to an ultimate consumer other than an industrial or commercial user. A seller who in the regular course of business makes sales at retail is a retailer.” (U. S. Economic Stabilization Agency, General Ceiling Price Regulation, Approved: January 26, 1951, p. 8.)

“‘Sale at retail’ or ‘selling at retail’ means a sale or selling to an ultimate consumer other than an industrial or commercial user, except that for the purposes of section 4 of this Regulation,<sup>1</sup> a ‘sale at retail’ shall not include any sale by a producer, manufacturer, or fabricator of any commodity produced, manufactured, or fabricated by him.” (U. S. Office of Price Administration, The General Maximum Price Regulation, Bulletin No. 1, April 28, 1942, p. 12.)

“Retail Trade—The term ‘retail trade’ as used herein shall mean all selling of merchandise to the consumer and not for purposes of resale in any form in the continental United States excluding the Panama Canal Zone. . . .

“Retailer—The term ‘retailer’ as used herein shall mean any individual or organization engaged wholly or partially in the retail trade.” (U. S. National Recovery Administration, Code of Fair Competition for the Retail Trade, Approved Code No. 60, as Approved on October 21, 1933, p. 30.)

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<sup>1</sup> “Section 4, Supplemental Regulations.”: “If the maximum prices established for any commodity under the provisions of this Regulation fall equitably to distribute returns from the sale at retail of such commodity among producers, manufacturers, wholesalers, and retailers, the Price Administrator will by supplementary regulation establish such maximum prices for different classes of sellers, or fix base periods for the determination of their maximum prices, as will insure that each such class of resellers shall receive a fair share of such return. (Same, p. 4.)

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Concepts of Wholesale and Retail in Marketing  
Literature.

(The following definitions of "wholesaling" and "retailing" were taken from the writings of various authorities in marketing literature)

**Concepts of Wholesaling.**

"Theoretical Approach. . . . Wholesaling . . . includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase, whether the goods are purchased for resale in the same form or for use in the business or industrial process. . . .

"Practical Modification. . . . Wholesaling . . . includes all transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase, except for transactions that involve a small quantity of goods purchased in a retail store for business use, which transactions are considered as retail." (Beckman, Theodore N., Harold H. Maynard and William R. Davidson, *Principles of Marketing*, 6th Edition, New York, the Ronald Press Company, 1957, p. 265.)

"For the most part, wholesale merchants buy goods outright from manufacturers and suppliers and resell them to retailers or other outlets, usually granting credit and extending delivery service. Such firms may carry a broad line of merchandise or a relatively specialized and narrow line." (The *Encyclopedia Americana*, Volume 18, Washington, D. C., Americana Corporation, 1957 edition, p. 299e.)

"Wholesale middleman. A middleman is any dealer who assists in the distribution of goods from producer to ulti-

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mate consumer. Thus the retailer is a middleman. A **wholesale middleman**, however, assists in the distribution of goods from producers to retailers; he does not sell to the ultimate consumer. The wholesale middlemen from whom retailers buy may be either wholesalers or agent middlemen.

“**Wholesalers** are dealers who buy from producers or other wholesale dealers and sell to retailers or to institutional or commercial users. . . . Wholesalers that sell primarily to retailers are sometimes called **wholesale merchants**.” (Wingate, John W. [Professor of Business Administration in Charge of the Retailing Program, CCNY], and J. Dana Weiner [Coordinator of Distributive Education, Northeast High School, Philadelphia; Training Director, Best Markets, Philadelphia], *Retail Merchandising*, 5th Edition, New York, South-Western Publishing Company, 1957, p. 223.)

“A **wholesale sale** is one made by, or through the agency of, a business establishment whereby goods are transferred to (1) a retailer, (2) any other middleman, (3) an industrial, professional, or business user (including service enterprises), or (4) an institutional user such as hospital, school, or governmental body. The size of a sale has no bearing on whether or not it is a ‘wholesale sale.’ Definitely excluded from this concept of ‘wholesale sale’ are all sales to ultimate consumers, even when made by wholesalers.

“A **wholesaling middleman** (or ‘wholesaler,’ or ‘wholesale distributor’) is a business whose **major** activity is making wholesale sales, either on their own behalf or in an agency relationship.” (Shultz, William J. [presently professor of Business Administration, Supervisor of the Marketing Division, Bernard M. Baruch School of Business and Public Administration, CCNY; Marketing Consultant],

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Outline of Marketing, Iowa, Littlefield, Adams and Company, 1956, p. 61.)

“Individuals or business firms engage in wholesaling when primarily they sell to, or negotiate sales with, those who buy for purposes of (1) resale or (2) industrial use.” (Phillips, Charles F. [President, Bates College], and Delbert J. Duncan [Dean, School of Business, University of Colorado], *Marketing: Principles and Methods*, 3rd Edition, Illinois, Richard D. Irwin, Incorporated, 1956, p. 271.)

“Wholesaler. A merchant middleman who sells to retailers and/or to industrial, institutional, and commercial users but who does not sell in significant amounts to ultimate consumers.

“In the basic materials, semi-finished goods, and tool and machinery trades merchants of this type are commonly known as ‘dealers,’ ‘distributors’ or ‘supply houses.’ ‘Distributor’ is a term especially common in the appliance and automotive industries.)

“**Comment.** Generally these merchants render a wide variety of services to their customers. Those who render all the services normally expended in the wholesale trade are known as **Service Wholesalers**; those which (sic) render only a few of the wholesale services are known as **Limited Function Wholesalers.** . . .

“This definition ignores or minimizes two bases upon which the term is often defined; first, the size of the lots in which wholesalers deal, and, second, the fact that they habitually sell for resale. The figures show that many wholesalers operate on a very small scale and in small lots. Most of them make a significant portion of their sales to industrial users.” (Hepner, Harry Walker, *Modern Marketing Dynamics and Management*, New York, McGraw-Hill Book Company, Incorporated, 1955, p. 218.)



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“The terms **wholesaler** and **jobber** are, for the most part, now used interchangeably. Originally, the jobber was a dealer in odd lots of merchandise; but this usage of the word has almost disappeared. A wholesaler, or jobber, is a merchant middleman who sells to other middlemen—namely, retailers—or to industrial and commercial users, but who does not sell to ultimate consumers.” (Richert, G. Henry, *Retailing: Principles and Practices*, New York, McGraw-Hill Book Company, 1954, p. 51.)

“Wholesaling is the buying or receiving of goods in wholesale lots from producers or other wholesalers and their sales to retailers, producers, or other wholesalers. The producer from whom goods are bought may be a manufacturer or an agricultural producer, while the producer to whom goods are sold may include, along with both of these, the institutional buyer, who uses the goods to provide a service. Thus wholesaling may be carried on by producers, by merchants, by agents and brokers, and by producers and consumers acting through cooperative associations.” (Duddy, Edward A. [Professor Emeritus of Marketing, the School of Business, the University of Chicago], and David A. Revzan [Associate Professor of Business Administration, School of Business Administration, University of California], *Marketing: An Institutional Approach*, 2nd Edition, New York, McGraw-Hill Book Company, 1953, p. 242.)

“The term **wholesaling** is used to cover the operations of middlemen and producers in getting processed goods from their point of production to the retailers or processors, and in getting the raw materials from farms, mines, fisheries, and forests to processors.” (Converse, Paul D., H. W. Huegy, R. V. Mitchell [Professors of Marketing, University of Illinois], *Elements of Marketing*, 5th Edition, New York, Prentice-Hall, Incorporated, 1952, p. 304.)



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**“Wholesaler**—A merchant middleman who sells to retailers and to other merchants or to industrial, institutional, and commercial users or to all these classifications, but who does not sell in significant amounts to ultimate consumers. In the basic materials, semi-finished goods, and tool and machinery trades, merchants of this type are commonly known as dealers, distributors, or supply houses.

• • •

“This definition ignores or minimizes two bases upon which the term is often defined: first the size of the lots in which wholesalers deal, and, second, the fact that they habitually sell for resale. Figures show that many wholesalers operate on a very small scale and in small lots. Most of them make a significant portion of their sales to industrial users.” (Graham, Irvin, *Encyclopedia of Advertising*, New York, Fairchild Publications, Incorporated, 1952, pp. 564, 565.)

“Wholesaler: middleman who sells, usually in relatively large quantities, to retailers or (as **supply houses**) to industrial users.” (International Chamber of Commerce, *Dictionary of Marketing Terms*, Prepared by Richard Webster, Printed in Switzerland, Schuler S. A., Bienne, 1952, p. 97.)

“Wholesaling includes all sales by producers, by merchant and functional wholesalers or industrial supply houses, or by retailers to industrial, commercial or institutional buyers either for resale or for other use in the conduct of their enterprises.” (Marketing Handbook, Edited by Paul H. Nystrom, New York, the Ronald Press Company, 1951, p. 10.)

“Wholesale business consists primarily in selling to retailers, dealers, or distributors (who buy the goods for resale and not for their own consumption) or selling to in-

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stitutional or industrial users, such as hotels, ships or railways, who purchase for business use rather than for the purpose of reselling goods in the same form in contrast to retailers who typically sell to the consumers." (Margaret Hall, *Distributive Trading: an Economic Analysis*, London, Hutchinson's University Library, 1949, p. 79.)

"Wholesaler—A merchant middleman who sells to retailers and other merchants and/or to industrial, institutional, and commercial users but who does not sell in significant amounts to ultimate consumers." (American Marketing Association Defines Marketing Terms, *Printers' Ink*, January 14, 1949, p. 76.)

**Concepts of Retailing.**

**" . . . a retail sale is one in which the buyer is an ultimate consumer, as opposed to a business or institutional purchaser, and the motive is personal or family satisfaction stemming from the final consumption of the article being purchased, in contrast with purchases for resale or for business, industrial, or institutional use. . . .**

**"It is the composite of the transactions made by an establishment that gives it its principal character. A retail establishment may, therefore, be defined as a single or separate place of business, principally engaged in the performance of marketing functions, wherein or out of which sales are made primarily to ultimate consumers. . . .**

**"Most retail establishments are retail stores. These are places of business which are open to and frequented by the general public, and in which sales are made primarily to ultimate consumers, usually in small quantities, from merchandise inventories warehoused and displayed on the premises. . . .**

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"Retailers are merchant middlemen who are engaged primarily in selling to ultimate consumers. . . .

"From the foregoing discussion it is evident that different conceptions underlie the proper use of the terms **retailing, retail establishment, retail store** and **retailer**. Retailing, in the broadest conception, **is the activity of selling to ultimate consumers for personal or household consumption.**" (Emphasis italicized in original.) (Beckman, Theodore N., Harold H. Maynard, and William R. Davidson, *Principles of Marketing*, 6th Edition, New York, the Ronald Press Company, 1957, pp. 126, 127.)

"Retailing is the distribution of goods and services to final or household consumers." (Kelley, Pearch C., and Norris B. Brisco, *Retailing: Basic Principles*, New Jersey, Prentice-Hall, Incorporated, 1957, p. 1.)

"Retailing may be defined as the activities incident to selling goods and services to **ultimate consumers**. Retailing is the final link in the chain of distribution of most products from initial producers to ultimate consumers. (Shultz, William J. [presently Professor of Business Administration, Supervisor of the Marketing Division, Bernard M. Baruch School of Business and Public Administration, CCNY; Marketing Consultant], *Outline of Marketing*, Iowa, Littlefield, Adams and Company, 1956, p. 36.)

"By definition a retail store is one that sells to the ultimate consumer. Thus any person or organization dedicated to this purpose is a member of the retail group." (Bunting, James Whitney [President, Oglethorpe University, Georgia], *Essentials of Retail Selling*, New York, Bookman Associates, 1954, p. 13.)

"Retailing . . . is the activity of selling at retail or making retail sales.

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“ . . . a retail sale is one in which the buyer is an ultimate consumer, as opposed to a business purchaser, and the motive is personal or family satisfaction stemming from the final consumption of the article being purchased, in contrast with buying for the motive of profit in transactions involving purchase for business or industrial use or for resale.” (Emphasized italicized in original.) (Brown, Paul L. and W. R. Davidson, *Retailing: Principles and Practices*, New York, the Ronald Press Company, 1953, pp. 3, 4.)

“From the point of view of those who operate retailing agencies, retailing is that part of the marketing process that is concerned with making goods and services available to ultimate consumers. From the point of view of those who patronize retailers, retail buying is the purchase of goods and services by persons who will use them to satisfy their own wants and desires. The various types of retailers thus stand between the manufacturers and wholesale middleman on the one hand, and the ultimate consumer on the other, in which position they perform various services for each.” (Duddy, Edward Augustin [Professor Emeritus of Marketing, the School of Business, The University of Chicago], and D. A. Revzan [Associate Professor of Business Administration, School of Business Administration, University of California], *Marketing: an Institutional Approach*, 2nd Edition, New York, McGraw-Hill Book Company, 1953, p. 146.)

“The retailer, who may be defined as a middleman who sells mainly to the ultimate consumer, is a specialist who maintains contact between consumer and producer.” (Converse, Paul D., H. W. Huegy, and R. V. Mitchell [Professors of Marketing, University of Illinois], *Elements of Marketing*, 5th Edition, New York, Prentice-Hall, Incorporated, 1952, p. 347.)

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“Retailing—The activities incident to selling to the ultimate consumer. The goods may be produced, bought or carried in stock by the seller. This definition includes all forms of selling to the ultimate consumer. It embraces the direct-to-consumer sales activities of the producer whether through his own stores, by house-to-house canvass, or by mail order. It does not cover the sales by producers of industrial goods, by industrial supply houses, or by retailers to industrial, commercial or institutional buyers for use in the conduct of their enterprises.” (Encyclopedia of Advertising, Graham, Irvin, New York, Fairchild Publications, Incorporated, 1952, p. 443.)

“Retailing: the sale to the ultimate (individual or household) consumer, usually in relatively small quantities; distinguished from **wholesaling**—relatively large quantities to those who resell (the **retailers**).” (International Chamber of Commerce, Dictionary of Marketing Terms, Prepared by Richard Webster, Printed in Switzerland, Schuler S. A., Bienne, 1952, p. 77.)

“ . . . retail trade includes all sales of goods for personal and household consumption.” (Vaile, Roland S., E. T. Grether, and Reavis Cox, Marketing in the American Economy, New York, the Ronald Press Company, 1952, p. 173.)

“ . . . Retailing is defined by the Committee on Definitions [of the American Marketing Association] as ‘the process of selling to the ultimate consumer. The goods sold may be produced, bought or handled by the seller.’ It includes all forms of selling to the ultimate consumer, embracing along with the activities of the orthodox retail store the direct-to-consumer sales activities of the producer, whether through his own retail stores, by house-to-house canvass or by mail order.” (Marketing Handbook, Edited

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by Paul H. Nystrom, New York, the Ronald Press Company, 1951, p. 10.)

"Retailing is that part of the distributive process which is concerned with selling goods directly to the ultimate consumer." (Collins, George R., "Retailing," *Encyclopedia Britannica*, Vol. 19, 1949 edition, p. 231.)

"Retailing . . . has come to mean the conduct of a place of business where goods are sold to the ultimate consumer." (Hall, Margaret, *Distributive Trading: an Economic Analysis*, London, Hutchinson's University Library, 1949, p. 79.)

The retailer is "that middleman who stands nearest the ultimate consumer and serves as his 'purchasing agent.' " And, retail institutions are ". . . those marketing institutions engaged primarily in selling consumers' goods to ultimate consumers." (Phillips, Charles F., and Delbert J. Duncan, *Marketing: Principles and Methods*, Chicago, Richard D. Irwin, Incorporated, 1948, p. 141.)

"Retailer—A merchant or business establishment that sells mainly to the ultimate consumer.

"Comment. The retailer is to be distinguished by the conditions surrounding the sale rather than the procurement of the goods in which he deals. Attempts to define the retailer on the basis of the size of the units in which he sells prove indefensible. The size of his sales unit is an incidental rather than a primary element in his character. His essential distinguishing mark is the fact that his typical sale is made to the ultimate consumer.

"Retailing—the activities incident to selling to the ultimate consumer. The goods sold may be produced, bought or carried in stock by the seller.

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“Comment. This definition includes all forms of selling to the ultimate consumer. It embraces the direct-to-consumer sales activities of the producer whether through his own stores, by house-to-house canvass, or by mail order. It does not cover the sale by producers of industrial goods, by industrial supply houses, or by retailers to industrial, commercial, or institutional buyers for use in the conduct of their enterprises.” (American Marketing Association Defines Marketing Terms, Printers' Ink, January 14, 1949, p. 76.)

“Ultimate Consumer—One who buys and/or uses goods or services to satisfy personal or household wants rather than for resale or use in business, institutional, or industrial operations.

“Comment. There seems to be a growing tendency to drop the word ‘ultimate’ from this term. The Committee recommends that this tendency be encouraged.

“The definition distinguishes sharply between industrial users and ultimate consumers. A firm buying and using an adding machine, a drum of lubricating oil, or a carload of steel billets is an industrial user of those products, not an Ultimate Consumer of them; under the developing usage it is not even a ‘consumer’ of them. A vital difference exists between the purposes motivating the two types of purchases which in turn results in highly significant differences in buying methods, marketing organization, and selling practices.” (American Marketing Association Defines Marketing Terms, Printers' Ink, January 14, 1949, pp. 74, 76.)

“Retailing is that phase of general commerce devoted to the distribution and sale of goods to ultimate consumers.

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It includes the sale not only of merchandise but also of services incidental or necessary to the use of such goods.

. . . The distinguishing feature of the retail trade is that its business consists in selling merchandise to ultimate consumers." (Nystrom, Paul, "Retail Trade," Encyclopedia of Social Sciences, Vol. 13, p. 346.)

**PLAINTIFF'S EXHIBIT 20.**

National Recovery Administration Definitions.

**Approved Code No. 174—Code of Fair Competition for the Rubber Tire Manufacturing Industry, as Approved on December 21, 1933, by President Roosevelt:**

"Section 1. The term '**Rubber Tire Manufacturing Industry**' or '**Industry**,' as used herein, shall mean the manufacture for sale in the continental United States (including Alaska) and sale at wholesale by manufacturers or subsidiaries or affiliates of the same of solid or pneumatic rubber tires and/or pneumatic rubber tubes, together with such related branches or divisions as may from time to time be included under the provisions of this Code by the President, after such notice and hearing as he may prescribe.

"Section 2. The term '**member of the industry**' or '**member**' as used herein includes, but without limitation, any individual, partnership, association, corporation, or other form of enterprise engaged in the manufacture or both manufacture and sale at wholesale of any products of the industry, or any subsidiary or affiliate of the same engaged in the sale at wholesale of any products of the industry" (p. 340).

. . .



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“Section 6. The term ‘dealer’ as used herein, shall mean anyone, whether or not a member, who has a financial interest therein, who purchases a member’s brand of tires and/or tubes, from a member or jobber under contract for sale, either absolute, conditional, or on consignment, and who in turn resells to other than employees or affiliated companies, at least 75 percent of the tires or tubes so purchased. Company retail stores, whether wholly or partly owned, shall be classified as dealers” (p. 340).

“Section 7. The term ‘jobber’ as used herein, shall mean anyone who sells at least 75 percent of his total volume of tires and/or tubes through or to dealers for resale to consumers, whether or not such dealers are owned or affiliated with or controlled by such jobber, and who performs the services of a jobber such as maintaining a stock, selling, shipping, billing and carrying accounts receivable” (p. 341).

**Approved Code No. 410—Code of Fair Competition for the Retail Rubber Tire and Battery Trade as Approved May 1, 1934, by President Roosevelt:**

“Section 1. The term ‘Retail Rubber Tire and Battery Trade’ or ‘Trade,’ as used herein, shall mean the sale or offering for sale to the ultimate consumer and not for resale purposes of:

“a. Solid or pneumatic rubber tires and pneumatic rubber tubes.

“b. Automotive storage batteries for starting, lighting, and/or ignition service and radio receiving storage batteries.

“c. Tire or battery parts and accessories.

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“d. Automobile rims and wheels in connection with change-over from one type of tire equipment to another.

“e. The servicing of products of the trade” (p. 512).

**PLAINTIFF'S EXHIBIT 21.**

**The Holland Amendment.**

**Price and quantity test.**

Senator Holland, the sponsor of the amendment to 13 (a) (2), that “a ‘retail or service establishment’ shall mean an establishment 75% of whose annual dollar volume of sales of goods and services (or of both) is not for resale and is recognized as retail sales or services in the particular industry”—stated that his amendment did not overrule the price and quantity tests for distinguishing between retail and wholesale sales. He stated that the intent of his amendment was that sales involving quantities of goods materially in excess of that which the general consuming public regularly purchases should not be considered as retail sales, if such sales involved a special discount from the normal retail price. Senator Holland expressed himself to this effect repeatedly, as the following statements on the floor of the Senate, on Tuesday, August 30, 1949, shows:

“Mr. Pepper. It is not a fact that under the amendment offered by my distinguished colleague and his associates a so-called retail establishment could sell to purchasers in any quantity whatever without losing its retail character?

“Mr. Holland. No. If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales,

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they would lose their exemption. That is perfectly clear from the amendment, and it is perfectly clear from all the discussion of the subject before the committee and on the floor of the Senate" (95 Cong. Record, p. 12497).

"Mr. Holland: Mr. President, I find it impossible to distinguish between sales in small volume—which are recognized in an industry as retail—sales to a local hotel or local laundry or to a local business building or city hall or courthouse or any other business place, when the sale is a part of the normal, everyday retail business, assuming that the sale is not made in such quantity that discounts are allowed. Of course, if it is, it comes in the category of wholesale sales" (95 Cong. Record, p. 12501).

"Mr. Holland: A wholesale transaction would be one in such quantities as to be beyond the industry's standard for retail sales and when the purchases are made in such quantities as to entitle the purchaser to discounts such as are allowed in wholesale transactions. I think the same standard would apply to any type of commodity sold" (95 Cong. Record, p. 12501).

Senator Holland also reiterated this interpretation in a list of questions and answers which he submitted:

"Question: Do quantity and price involved in a sale play any part in the proposed amendment in determining the applicability of the exemption?

Answer: Yes. Under paragraph (2) of the proposed amendment a sale is not retail unless regarded in the particular industry as such. As a general rule, sales in quantities substantially larger than those to the average buyer and at a substantial discount are regarded as wholesale and not as retail.

. . .

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Question: What tolerance or allowance for wholesale or nonretail selling or servicing is provided for in the proposed amendment?

Answer: Twenty-five percent. The same as the Administrator allows under the present law. See the Administrators 1948 Annual Report to Congress, page 119. Under paragraph (2) of the proposed amendment the 25 percent tolerance would be for transactions not recognized in the particular industry as retail selling or servicing such as sales for resale and quantity, sales at a discount" (95 Cong. Record, p. 12505).

**Recognized as retail sales or services in the particular industry.**

Senator Holland stated that it was not the intent of the phrase and is recognized as retail or service in the particular industry to delegate full authority to a trade association or any other interested group in an industry to decide for itself what was a retail sale in that particular industry. The definition given by a trade association would merely be one criterion in the determination. Other generally accepted criteria would also be taken into consideration. The "well-settled habits of business would be considered." In the final analysis it would be up to the Administrator to define retail sales. If the administrative rulings and interpretations were not regarded as sound by individuals concerned they could appeal for a ruling by the courts.

The following statements made on the floor of the Senate when the amendment was being considered (August 30, 1949) show this:

"Mr. Douglas. I should also like to ask the Senator from Florida the meaning of the phrase:

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‘And is recognized as retail sales or service in the particular industry.’

Who is to define that?

“Mr. Holland. Who but the Administrator? If the administrative or interpretative ruling is not regarded as sound by the individual person concerned, then he can appeal; and then the matter will be ruled on by the courts.

“Mr. Douglas. I understand that the interpretation which would be made would be that given to a ‘retail sale’ by a trade association.

“Mr. Holland. That is one criterion, of course; but I do not believe that Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or any other interested group” (95 Cong. Record, p. 12501).

“Mr. Aiken. Does not that [the phrase ‘and is recognized as retail sales or services in the particular industry’] throw the situation wide open for each industry to determine whether its sales shall be considered retail or wholesale?

“Mr. Holland. It is not the judgment of the sponsors of the amendment that that would be the result. On the contrary, it is our belief that the Administrator would have a function to perform, and if he goes astray, in the judgment of individuals who are affected he could be appealed from, the case could be taken to court” (95 Cong. Record, p. 12510).

“Mr. Aiken. Then we have the Senator’s assurance that this wording is clearly not intended to permit any industry to determine for itself what are generally recognized as retail sales?

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"Mr. Holland. No, . . . There would be various criteria which could be applied, one of which, of course, would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply. The well-settled habits of business must be applied. They will not necessarily be the same in all trades of businesses" (95 Cong. Record, p. 12510).

**PLAINTIFF'S EXHIBIT 22.**

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Mr. Pepper. Is it not a fact that under the amendment offered by my distinguished colleague and his associates a so-called retail establishment could sell to purchasers in any quantity whatever without losing its retail character?

Mr. Holland. No. If sales were made in sufficient quantity so there would be a discount and they would be regarded not as retail sales, but as wholesale sales, they would lose their exemption. That is perfectly clear from the amendment, and it is perfectly clear from all the discussion of the subject before the committee and on the floor of the Senate. There are many people in business, as, for instance, automobile dealers, who, in the very nature of things do not sell small articles, but sell by the unit, and who would sell a truck to an individual purchaser just as they would sell one to any business enterprise, one at a time, at the same price. Yet under the rulings of the Administrator, as upheld by one of the courts, those who are selling trucks are not making a sale which can be regarded as retail, because the truck is to be used in business. Therefore, under the test and standard imposed, such a sale can never be regarded as a retail sale. In other words, the distinction is made that the same salesman selling a Cadillac car to a person for his use by himself and his family is

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regarded as having made a retail sale, whereas in selling a Ford truck to someone who is going to use the truck for business purposes, as trucks have to be used, he is regarded as not having made a retail sale. The unfortunate businessman who is in the truck business solely, or a large part of whose sales are sales of trucks, is deprived of the exemption, and is in a terrible fix, whereas his neighbor across the street, who may be selling a much more expensive article, is exempted because his article is sold in the form of passenger cars to family users thereof.

Mr. Pepper. Mr. President, will my colleague yield?

Mr. Holland. I yield.

Mr. Pepper. I again call attention to the fact that I do not so understand the regulations of the Wage-Hour Administrator. It is my understanding that if the article purchased by the business user is the kind of an article generally that is bought in only such quantity as an ordinary consumer would require, the sale would not be regarded as other than a retail sale. For example, take the truck case my colleague cited. I have talked to the representative of the Wage-Hour Division a good many times about this matter, and it is my understanding that if the sale to a business user of a truck is of the same general kind of truck that a farmer or an individual user would buy, for example, a pick-up truck, the fact that the business purchaser happened to buy the truck makes no difference, but if it is a 5-ton truck, or a 10-ton truck, the kind of truck which no individual user for consumption purposes would ordinarily acquire, but is adopted only for the kind of business use for which a truck is ordinarily used, that would not be accounted as a retail sale, but would be accounted as a nonretail sale. If an automobile dealer sold a Cadillac passenger car to a business user it would be considered a retail sale, but if he sold a fleet of Cadillac cars to one who

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was operating a taxicab company, or a commercial venture, that would not be regarded as a retail sale.

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Mr. Holland. Mr. President, in reply to my distinguished colleague, I will say that in the ruling of the court in the case of McComb against Deibert, in the eastern district of Pennsylvania, and now, as I understand, on appeal before the United States Court of Appeals for the Third Circuit, the court departed entirely from the principle announced by my colleague and I shall, if I may, read from that decision a couple of paragraphs.

While that case turned on only one type of retailer, namely, an automobile dealer, it exemplifies graphically the error of the position taken by the courts and the Administrator. I call the attention of my colleague to the fact that in that case the court in effect held that no sale of a truck can be retail because a truck is always sold for business purposes rather than for personal, family, or household use. Even though the court denied the exemption, it found—and I quote from the decision of the learned judge:

“It is a well-recognized concept in the automotive-trade industry that sales of trucks in nonfleet quantities to persons for business or commercial use and not for resale purposes have always been regarded as retail; sales of trucks for resale or in fleet quantities are not considered retail.

“The industry has never drawn any distinction between the sale of passenger cars and the sale of trucks with respect to the question of whether the transaction is retail or not. In both cases the transaction is regarded as retail so long as the sale is to the ultimate purchaser in nonfleet quantities. No distinction is drawn from the fact

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that the truck is sold for business or commercial purposes while the passenger car is, in the main, sold for personal



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or family use. The same holds true for passenger car parts and truck parts."

Mr. President, those two paragraphs are quoted from the decision of the learned judge in the trial court in the case of McComb against Deibert.

Mr. Pepper. Mr. President, will my colleague yield?

Mr. Holland. I yield.

Mr. Pepper. Does the Senator have before him anything to indicate the nature of the truck which was actually involved in that case?

Mr. Holland. I have the entire decision, if my colleague would like to read it.

Mr. Pepper. I call attention to that because I have been informed that it is pertinent to observe that the truck in that case was a distinctive kind of truck, built only for a business purpose, not the kind

August 30, 1949      95 Cong. Rec.      Page 12498 Cont'd  
of a truck which would be purchased ordinarily by one expecting to use it for his personal use.

Mr. Holland. In reply, I call to the attention of my distinguished colleague the fact that the paragraphs quoted included no such reference at all, but instead state a general rule and state a general finding and holding of the learned judge in that case. It seems to me that it goes even further than that in the last sentence, which I read, namely:

"The same holds true for passenger car parts and truck parts."

**PLAINTIFF'S EXHIBIT 23.**

**History of the Tire Dealer.**

The use of the term "retail dealer" in the tire and tube trade appears to be historical rather than descriptive of

*Plaintiff's Exhibit 23*

the current activities of the tire and tube distributor. Thus, Hugh Allen, in the House of Goodyear, a Story of Rubber and of Modern Business,<sup>1</sup> states that at first the tire and tube manufacturers were primarily interested in selling to car manufacturers. It was only later that the manufacturers became interested in the replacement markets. They began selling in this market through small retail dealers. Thus, Mr. Allen states:

“Car manufacturers insisted that replacement tires be available where anyone who bought their cars could pick up new tires quickly and easily” (p. 340).

\* \* \*

“Tire dealers were almost all small accounts, many of them former vulcanizers or bicycle repairmen. The retailing had not begun to attract well financed merchandisers” (p. 341).

“The company had been fortunate in getting a gratifying percentage of the original equipment business. . . . However, Stadelman [in charge of sales and later a president of the company] believed a still bigger potential market was to be found in the increasing number of individual car owners over the country” (p. 341).

Albert Abrahamson, in Section III, entitled “The Automobile Tire—Forms of Market in Combat,” in Price and Price Policies, edited by Walton H. Hamilton, Professor of Law at Yale University,<sup>2</sup> stated:

“The early tires bore the mark of unreliability. Not only was their normal span of life short—less than a year—but their life expectancy had set over against it

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<sup>1</sup> Corday and Gross, Cleveland, Ohio, 1943 Ed.

<sup>2</sup> McGraw-Hill Book Company, Inc., New York, 1938.

*Plaintiff's Exhibit 23*

blowouts and other casualties. It was highly convenient for the garage to act both as the agency of sale and as the instrument for intermittent repair. As the tire improved in quality, the link with the garage was broken, and a multiple of simple sales agencies entered the tire business. At first these were small shops—auto equipment stores, hardware shops, experimental ventures in the sale of tires new and second-hand” (p. 10).

Warren W. Leigh, in Chapter 5, entitled “Automotive Tires,” in *Marketing Channels for Manufactured Products* edited by Richard M. Clewett, Ph. D., states:

“Bicycle and carriage shops were the pioneer tire sellers. Then garages, hardware stores and general stores entered the picture. As automobile registrations increased and the tire market grew, specialized tire dealers developed” (p. 125).

Hugh Allen in the House of Goodyear states:

“Gradually the dealer program evolved which was markedly to influence the industry. The independent dealer was the Keystone. The program was to pick dealers carefully, allot them as much territory as they could adequately handle, give them the fullest possible advertising and merchandising help and provide a Goodyear sales force large enough and intelligent enough to work effectively with them” (p. 342).

The development of the truck followed that of the passenger automobile. Truck transportation began with the substitution of small delivery trucks for horses and wagons in local service. The first trucks were generally converted passenger cars. As manufacturers and merchants realized that if the automobile were to be used for delivering heavy

*Plaintiff's Exhibit 23*

loads, the chassis must be stronger and larger and the engine more powerful, the manufacture of trucks began.<sup>1</sup> About 1914 Goodyear began replacing solid tires with pneumatic tires. However, the early pneumatic tire was inflated to 70 pounds pressure. Improvements in rubber manufacture produced a low pressure tire which made possible the carrying of heavier loads in lighter vehicles at greater speed. In the twenties pneumatic tires rapidly replaced solid tires. By 1920 truck transportation had increased as the following motor truck registrations show:<sup>2</sup>

Year	Registrations
1904.....	410
1905.....	1,400
1910.....	10,000
1915.....	136,000
1920.....	1,006,082
1925.....	2,440,854

Hugh Allen, in the House of Goodyear, states:

“While there were thousands of individual truck owners, the big market was in fleets of truck, operated by business, construction and supply houses. The fleet owners, the big market was in fleets of trucks, operated preferred to have their tires serviced by one responsible dealer, rather than set up their own plant. This business grew and in time only the larger independent dealers had the finances and facilities to furnish this, and the company store filled this gap” (p. 357).

Albert Abrahamson, in his chapter on “The Automobile Tire—Forms of Marketing in Combat,” in *Price and Price Policies* edited by Walton H. Hamilton, states:

<sup>1</sup> Reck, Franklin M., *The Romance of American Transportation*, 1938, pp. 201-202.

<sup>2</sup> Automobile Manufacturers Association, *Facts and Figures of the Automobile Industry*, 1941, p. 11.

*Plaintiff's Exhibit 23*

“Another group of important tire buyers is the commercial consumers. Originally the factories themselves solicited these accounts and gave the owners of fleets of cars special discounts. Then the business fell into the hands of factory-owned stores or dealers in the cities, who secured special discounts from manufacturers and passed them on to large buyers. Now the trend is reversed and the manufacturer is again taking over volume sales” (p. 100).

Warren W. Leigh, in his chapter on “Automotive Tires” in *Marketing Channels for Manufactured Products*, edited by Richard M. Clewett, points out that gasoline service stations, parts and accessory dealers, motor vehicle dealers, automotive repair shops, farm equipment dealers, department stores, chain stores and mail order houses have all gone into the retail tire distribution business. As a result of this, the tire dealer has gone heavily into selling to commercial accounts and to all these types of retail dealers. Thus he is no longer primarily in the retail business. But he is still being referred to as a retail dealer. Mr. Leigh states:

“The character of tire dealers has altered as they adapted themselves to the new competition and to changing market demands. These dealers have become primarily semi-wholesalers, truck tire sellers, and recappers instead of passenger tire retailers. The dispersion of the tire market plus the fact that a little retailer or gasoline station needs to carry only five passenger tire sizes to top 87 percent of the passenger car market has encouraged the multiplication of tire outlets. Tire manufacturers have encouraged tire dealers by their discount programs, to carry tire stocks and sell and supply these small sub-dealers. On the other hand, the drift of passenger tire purchasing from downtown

*Plaintiff's Exhibit 24*

stores to outlying convenient locations has caused the large, more centrally located dealers to concentrate on the large-volume commercial account business, recapping and other tire services'' (pp. 131-132).

**PLAINTIFF'S EXHIBIT 24.**

**Confusion in Industry Regarding Definition  
of a Retailer.**

In a letter to the Honorable Aime J. Forand, Chairman, Subcommittee on Excise Taxes, House Ways and Means Committee, Washington, D. C., dated November 28, 1956, which was printed in Part 2 of the report of the Hearings before a Subcommittee of The Select Committee on Small Business of the U. S. Senate, 86th Congress, 2nd Session, on Dual Distribution in the Automotive Tire Industry, R. H. Miner, Assistant Secretary of the Goodyear Tire and Rubber Company, stated:

“Our retail stores also sell to Consumers as well as to other retailers” (p. 383).

*Government Exhibit 2—Marsh*

**GOVERNMENT EXHIBIT 2 TO DEPOSITION OF  
WINSTON W. MARSH.**

National Tire Dealers and Retreaders Association, Inc.

(Emblem)

1012 14th Street, N. W., Washington 5, D. C.  
METropolitan 8-6650.

July 3, 1958

Honorable Clarence T. Lundquist  
Administrator  
Wage and Hour Division  
Department of Labor  
Washington 25, D. C.

Re: Proposed Part 779.37 of Title 29, Code of Federal  
Regulations—Application of the 13 (a) (2) and  
13 (a) (4) Exemptions to the Automotive Tire  
Trade.

Dear Mr. Lundquist:

The National Tire Dealers and Retreaders Association, Inc., is a non-profit trade association whose membership consists of independent tire dealers and retreaders throughout the United States. Following the publication in the June 6 issue of the Federal Register of the proposed revisions to the Wage and Hour Division Regulations by adding Part 779.37 entitled "Application of the 13 (a) (2) and 13 (a) (4) Exemptions to the Automotive Tire Trade," we sent copies of the proposed regulation to each member of our association. As a result we herewith submit for your consideration suggested revisions which we believe will clarify and strengthen this Regulation.

Since one purpose of this Regulation is to clarify the application of the exemption for the individual dealers, we

*Government Exhibit 2—Marsh*

feel that the terms used in the Regulation should be defined as clearly as possible. Reference is made in Section 779.37 (b) (3) to the term "national accounts" as known in the trade. We believe that a definition of a national account would strengthen the Regulation and render it more meaningful to the tire dealers. National accounts are generally considered as those accounts which have the privilege of purchasing tires anywhere in the country and to be billed directly by the tire manufacturer rather than the dealer who delivers the tires. We would suggest, therefore, that Part 779.37 (b) (3) be amended by adding the following statement:

As used in this section, a national account is an account which takes delivery of tires in two or more states of the United States on a centralized billing or centralized pricing basis, where such billing or pricing is handled directly by the tire manufacturer, it shall be known as a national account sale.

It is our understanding that a sale by an individual dealer to a so-called national account where the dealer bills and is paid directly for the tires would constitute a retail sale. It is only those sales which are handled on the single billing centralized billing or centralized pricing by the manufacturer that would not be considered as retail sales for the purpose of this Regulation.

In sub-section (b) (4) a "fleet account" is defined, but in sub-sections (5) and (6) the phrase "customer's fleet" is referred to without definition. If it is intended that this phrase have the same meaning as a "fleet account," as defined in sub-section (4), then we believe that sub-sections (5) and (6) should refer to this definition. Also in sub-section (6) reference is made to sales to a customer's fleet "at a price below the prevailing retail price." If the term



*Government Exhibit 3—Marsh*

“customer’s fleet” in this section is defined, then we suggest that the section be further amended to refer to a “price below the prevailing retail price for such fleet account sales.” The purpose of this suggestion is to clarify the retail price which is referred to. It would appear intended that the reference is to the prevailing retail price for such fleet sales rather than the prevailing retail price for individual sales.

We will appreciate your consideration of these suggestions which are designed only to strengthen and make more meaningful this proposed Regulation. This explanation by the Wage and Hour Division we believe will be a significant contribution to the understanding and enforcement of the Wage and Hour Regulations.

Sincerely yours,

NATIONAL TIRE DEALERS AND  
RETREADERS ASSOCIATION,  
INC.,

W. W. MARSH,

Executive Secretary.

dl

**GOVERNMENT EXHIBIT 3 TO DEPOSITION OF  
WINSTON W. MARSH.**

Mr. W. W. Marsh  
Executive Secretary  
National Tire Dealers and Retreaders Association  
1012 14th Street, Northwest  
Washington 5, D. C.

Dear Mr. Marsh:

This is in accordance with the request made in your letter of July 3, 1958, and at your meeting with members of

*Government Exhibit 3—Marsh*

our staff on July 11, 1958, that the following terms used in the automotive tire trade determination be clarified upon final publication of the determination:

(1) **"National account"** sale. This is a sale where delivery of tires is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment may be made to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.

(2) **Customer's fleet.** The definition of "fleet account" in subsection 779.37 (b) (4) also applies to the term "customer's fleet" as used in subsections (b) (5) and (b) (6) of the determination.

Very truly yours,

Administrator.

REX:HH:gt

10/23-11/4/58-11/10

Orig.

cc: General Files

DEFENDANT'S EXHIBIT C—A. E. STEEPLETON.

67832

STEEPLETON GENERAL TIRE CO.

PHONE JA 1-6341

Monroe at Fourth  
MEMPHIS 2, TENNESSEE

REG.  
CASH  
GTAC  
EX. P.  
SP.

SOLD TO  
STREET  
CITY

Engelberg Packing Co.  
1186 Riverside Drive  
City

DATE

SALESMAN

19  
Casett

QUANTITY	SIZE AND TYPE	PLY	SERIAL OR BRAND NO.	UNIT	EXTENDED	UNIT PRICE	AMOUNT
	Add 1 billing on Inv # 47428						
1	7.50/20 Traction Rib	10					
	Billed at				474 948	7017	14034
	Should have been				474 948	7800	15600
	+ 66¢					783	1566

We warrant and represent that the title to the above described property remains in STEEPLETON GENERAL TIRE CO. until fully paid. If this account is not paid when due, it, we, or either of us agree to pay all attorney's fees and all other costs which may be incurred in the collection of this account.

RECEIPT OF THE MERCHANDISE IS ACKNOWLEDGED BY:

Sub Total

1566

47

1613

TIME OUT

SIGNED:

TIME IN

DATE

DELIVER TO:

NEVER RETURN PRINT - MEMPHIS

Defendant C.

63528

**STEEPLETON GENERAL TIRE CO.**

PHONE JA 2-5111

**Monroe at Fourth**  
**MEMPHIS & TENNESSEE**

**SOLD TO**

**STREET**

CITY.

DATE \_\_\_\_\_

**SALESMAN**

**NAME AND TITLE**

24

RECEIVED: 22 FEBRUARY 1993

1999

**RESEARCH**

## WHAT'S NEW

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Ray			VER 34436				

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and not containing that title in the above described property remains in STEPLETON GENERAL TIME  
 1/18/1918. If the amount is not paid within 10 days, we or either of us agree to pay all attorney's fees  
 and costs which may be incurred in the collection of the amount.

IN WITNESS WHEREOF, we have hereunto set our hands and seals at the city of New York, this 18th day of January, 1918.

W. STEPLETON  
 J. STEPLETON

WITNESSES:  
 J. STEPLETON  
 J. STEPLETON

Sub Total 161.00  
 496

THE GUY  
NAME  
PHONE NO  
DATE  
DELIVER TO: 1701

pendant. Ex. 6

*Defendant's Exhibit G—de Bruin*

**DEFENDANT'S EXHIBIT G—WALTER E. de BRUIN.**

February 1, 1954.

Memorandum Taken From Wage-Hour Administrator's 1953 Annual Report to the Secretary of Labor.

**January 25th, Wage and Hour Reporter, Page 1024.**

**Administrative Actions.**

Taking note of the administrative actions which were taken by the Division during the year, the report notes that opinions were issued on most of the coverage questions presented. The report did not indicate, however, when work on Subpart B of the Division's coverage bulletin would be completed. This bulletin was characterized by the 1952 report as providing an explanation of how the coverage provisions apply to specific industries and to employees in specific occupations, such as employees of wholesalers who distribute within the state goods coming from another state, and employees in the construction industry.

At the present time there is no comprehensive bulletin dealing with what constitutes "hours worked" under the law. Such a bulletin has been in preparation during the past year, and it is expected that it will be issued some time this year.

Turning to the law's numerous exemptions, the report declares that serious difficulties have been encountered in making determinations as to which sales and services are "recognized as retail \* \* \* in the particular industry" under Section 13 (a) (2) and which establishments are "recognized as retail \* \* \* in the particular industry" as required by Section 13 (a) (4).

*Defendant's Exhibit H—de Bruin*

Some industries, according to the report, do not follow traditional patterns of distribution, and they may deal extensively with large commercial and industrial customers as well as the personal consumer and the small business firm. Elaborating on this point, the report states:

“In such industries clear lines of demarcation between sales which are recognized as retail and sales which are not so recognized often do not exist, or if they do exist are not readily ascertainable. In such cases determinations can be made only on the basis of careful and extensive findings of fact relating to the entire industry. Even on this basis, however, it is recognized that the lines drawn may only be approximate. Progress has been made in completing industry studies and formulating determinations in a number of such industries, including automobile, coal, farm implements, farm feed, ice, stationery, and tires. Additional work remains to be done, however, before the determinations can be issued.”

**DEFENDANT'S EXHIBIT H—WALTER E. de BRUIN.**

Copy

U. S. Department of Labor

Wage and Hour and Public Contracts Divisions

Washington 25, D. C.

March 31, 1954

Mr. George T. Kilmon  
Assistant Secretary and Counsel  
B. F. Goodrich Company  
500 South Main Street  
Akron, Ohio

Dear Mr. Kilmon:

Mr. Joseph Goldberg of my staff informs me that on February 4th, in the course of a conference with him, you

*Defendant's Exhibit H—de Bruin*

expressed interest in the subject of determining what sales are recognized as retail in the tire trade under the exemptions provided by sections 13 (a) (2) and 13 (a) (4) of the Fair Labor Standards Act. He recalls you indicated that the sales practices of the establishments operated by the larger independent tire dealers may differ from those of the tire stores operated by your company. In this connection you suggested that you might explore the matter of industry recognition with appropriate representatives of your company, the Firestone Tire & Rubber Company, and the Goodyear Tire & Rubber Company. We have now reached the point in the study of the subject where such industry data could be of considerable value in the solution of the problem before us. Therefore if you have been able to secure such data we would appreciate receiving it.

In the event you have been unable to proceed with your plan in the above respect, please let us know whether you expect to be able to do so in the near future. In the latter case the approximate date when the information may be available to us will be helpful in the making of our plans.

Should you wish to discuss this matter with us we would be glad to do so at your convenience. In this regard also it would be desirable to proceed at the earliest possible date.

Very truly yours,

/s/ HARRY WEISS,

Assistant Administrator.

*Defendant's Exhibit I—de Bruin*

**DEFENDANT'S EXHIBIT I—WALTER E. de BRUIN.**

Copy

U. S. Department of Labor  
Wage and Hour and Public Contracts Divisions  
Washington 25, D. C.

April 16, 1954

Office of the Administrator

Mr. G. T. Kilmon  
Assistant Secretary and Counsel  
The B. F. Goodrich Company  
500 South Main Street  
Akron, Ohio

Dear Mr. Kilmon:

This will acknowledge your letter of April 8, 1954, indicating that your company, the Goodyear Tire & Rubber Company, Firestone Tire & Rubber Company, and the General Tire & Rubber Company would like to submit a joint memorandum regarding retail sales or services in the tire industry in connection with the exemption under section 13 (a) (2) and section 13 (a) (4) of the Fair Labor Standards Act. However, it is noted that from two to three months will be needed by you to complete the study of this subject.

I shall be very glad to have such a joint memorandum from your representative group. However, the Divisions are under considerable pressure to reach a determination in the matter and I am not perfectly sure it can be delayed as long as three months. Therefore we would appreciate your doing whatever you can to expedite completion of the



*Defendant's Exhibit J—de Bruin*

joint study, with a view of getting the report to us as soon as possible. I am sure the material will be valuable to us.

Very truly yours,

HARRY WEISS,

Assistant Administrator.

**DEFENDANT'S EXHIBIT J—WALTER E. de BRUIN.**

Memorandum by B. F. Goodrich, Goodyear, General  
and Firestone on What "Is Recognized as  
Retail Sales" in the Tire Industry.

**1. Introduction.**

Because there are thousands of independent tire dealers, both large and small, who conduct their businesses in all sections of the country, as well as because the named companies operate (either through the parent company or subsidiaries) more than 1750 retail stores, the unusual importance of a proper decision in this matter is self-evident. If possible, agreement on this matter between the Administrator and the particular industry is much to be preferred to protracted litigation.

This memorandum is submitted by the named tire companies primarily in their capacities as owners and operators of retail stores (hereinafter called "company stores"), rather than as manufacturers and wholesale distributors of tires. Of necessity, the principal discussion will be of sales made by company stores and those made by independent tire dealers. As used herein, "tires" includes tubes.

Tires are manufactured by many companies and in many sizes and types, not all companies making all sizes and types. The manufacturer may sell his products in any num-

*Defendant's Exhibit J—de Bruin*

ber of methods, such as sales direct to manufacturers of automobiles or trucks (commonly called "original equipment" sales); direct to distributors or jobbers; direct to dealers who sell to the consumer, and, as in the case of the named companies, a portion of their products to consumers through company stores which sell direct to the consumer. It is safe to state that the greatest number of tires manufactured in the United States are sold direct to independent tire dealers who in turn sell them to consumers, whether individuals, industrial concerns or commercial accounts. We are here concerned with the sales of tires which are made by independent dealers or company stores direct to such consumers.

As used herein "retail sales," "consumer sales," or any similar term, shall be understood to mean sales of tires **made by dealers and company stores** to individuals, industrial concerns and commercial accounts, our chief concern being with sales to the two latter types of consumers which are referred to herein as "commercial sales" or "sales to commercial accounts."

## **2. The Background of the 1949 Amendments.**

Since they are well-known to the Administrator, we shall not discuss the history of the Fair Labor Standards Act (hereinafter called "FLSA"), as originally passed in 1938, or the many controversies between the Administrator and members of the tire industry regarding what constituted retail sales prior to the 1949 amendments. It will be recalled, however, that at all such times the members of the tire industry earnestly disagreed with, even though they conformed to, the Administrator's various rulings regarding quantities, discounts, sizes of tires, and the use to which tires were put as being factors which in any way were determinative of the character of the sales involved.

*Defendant's Exhibit J—de Bruin*

Suffice it to say at this point that the position of the members of the tire industry has been uniform both before the passage of the 1938 Act, after the passage thereof, and both before and after the passage of the 1949 amendments.

It cannot be seriously doubted that the rulings of the Administrator and the approval thereof by the Courts, especially in *Roland Electrical Co. v. Walling*, 326 U. S. 675, caused such dissatisfaction with the FLSA as to result in the extensive amendments made in 1949. It must be conceded that the change in the retail establishment definition was one of the major changes which, as the Conference Report by the House Managers stated, was necessary

“in order to obviate the sweeping ruling of the Administrator and the courts that **no sale of goods or services for business use** is retail.”\*

It will be recalled that the Administrator vigorously opposed Senator Holland's amendment and put forth his best efforts to have his own proposal adopted by Congress so as to enable him to continue substantially the same interpretations previously in effect, at least insofar as continuing the requirement that the sale of goods or services for business use could never be a retail sale.

The new rule adopted in the 1949 amendments, namely,

**“recognized as retail sales or services in the particular industry,”**

is clearly mandatory and as the House Managers stated in their Report:

**“Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale, so long as such sale or service is recognized in the particular industry as a retail sale or service.”**

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\* Emphasis supplied throughout.

*Defendant's Exhibit J—de Bruin*

The House Managers emphasized the importance of industry recognition, as applied to many types of named articles and other articles, by stating that such sales are retail

“so long as they are **recognized as retail sales** or **services in such industries.**”

It will be recalled that Senator Aiken attempted to amend Senator Holland's amendment by striking out the words, “recognized as retail sales or services in the particular industry,” for the reason that he thought it would

“throw the situation wide open for each industry to determine whether its sales shall be considered wholesale or retail,”

by permitting an industry to change its established practices for the purpose of defeating coverage under the act.

Although he obtained the support of twenty-two other Senators, the proposed Aiken amendment was defeated and the Holland amendment prevailed, clearly because the majority agreed that Senator Aiken's fears were not justified.

We regret to state that the Administrator's Interpretative Bulletin issued in October, 1950, under the title of “Retail and Service Establishments and Related Exemptions,” does not seem to give full recognition to the intent of Congress and also seems to indicate a desire on the part of the Administrator to continue in effect, to the extent possible, his previous interpretations that the character of the user, the quantities involved, the discounts granted and other factors are still determining elements in retail sales **generally**. While this position may have merit in some branches of the retail trade, it is respectfully submitted that, as will more fully appear hereinafter, there is no room for such tests in the tire industry.

We do not contend, as Senator Aiken feared might happen, that an industry could completely change its practices

*Defendant's Exhibit J—de Bruin*

and thereby defeat coverage under the Act. Fortunately, there is no room for any such suggestion in the **tire** industry because there has been no change in its practice and today it treats sales to all consumers as retail sales exactly as it did in 1949 and in any prior year of which we have knowledge, at least as far back as 1934.

**3. What Constitutes the Tire Industry.**

The Administrator has for determination, first, the question of what constitutes the tire industry, and, second, what "is recognized as retail sales" in such industry.

What is recognized in one industry as a retail sale might not be so recognized in other industries, and, therefore, recognition "in the **particular** industry" is all-important. If a sale in a particular industry is recognized as a retail sale, it must be so treated by the Administrator and the Courts. The language of the House Managers is perfectly clear to the effect that it "**will have to be**" so treated.

In his October, 1950, Interpretative Bulletin, the Administrator very properly states that the "distinction between a retail sale and a wholesale sale is a matter of **fact**." He then makes a distinction between "**in** the particular industry" and "**by** the particular industry," as a result of which he reaches the conclusion that the determination must be wider than the views of an employer or an association of employers and that the determination must rest upon

"the **understanding and knowledge** of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and **private and governmental research and statistical organizations**. The **understanding** of all these and others who have **knowledge** of recognized classifications in

*Defendant's Exhibit J—de Bruin*

an industry would all be relevant in the determination of the question."

We cannot concur in the Administrator's interpretation that he is entitled to consult persons who are **not** "in the particular industry." Congress limited the recognition to "in the particular industry," and statements of persons **outside** such industry can have no bearing. None of the organizations designated in the above-quoted Administrator's statement are a part of the tire industry. **If** any outsiders are to be consulted by the Administrator, their statements should be limited to **factual** expressions of how sales are **actually treated** in the tire industry. We respectfully submit that, under a proper interpretation of the Act, the **opinions** of "private and governmental research and statistical organizations" and others not in the industry as to how they **think** such sales are treated or should be treated, by the tire industry are wholly irrelevant.

This "particular industry" undoubtedly includes all independent tire dealers and company stores who sell to consumers. It may be that it could include those dealers and companies who operate exclusively as wholesalers, but there is considerable doubt about the propriety of such an inclusion. Whether or not wholesalers are included in the tire industry, there is, and always has been, a definite line of demarcation between wholesale sales and consumer sales and **all** of the latter uniformly have been treated as retail sales, regardless of the quantities, discounts or uses which might be involved.

4. **What Is "Recognized as Retail Sales in the Particular (Tire) Industry."**

Since it is so well known, we assume that it is unnecessary to discuss at length the fact that the establishments of independent tire dealers and company stores are estab-

*Defendant's Exhibit J—de Bruin*

lishments which have all of the physical characteristics of a store which makes sales and renders services to the general public and that such establishments are stores in the traditional sense of retail establishments. It is also well recognized that some of such establishments make sales of tires for resale (which sales are recognized in the industry as wholesale), but we are here concerned only with those sales which have been suggested by the Administrator as possibly being what he has denominated as "non-retail" sales because of quantity, price, use, or some other factor.

As the Administrator has accurately stated, "recognized" means "known," "understood," or "regarded" and, as stated by others, "treated as" or "practiced" in the industry.

In spite of the clear and unequivocal wording of the 1949 amendments, which were adopted over the Administrator's opposition, the Administrator appears to still cling to some of the same tests which he had promulgated prior to 1949 and, in dealing with retail sales **generally**, has again expressed the opinion that quantities (whether purchased at one time or over a period of time), discounts, and use by the consumer are important elements in the consideration of whether or not a sale is a retail one. Regardless of whether or not the quantity, discount, or use tests are now applicable to sales **in other industries**, such test or tests may not be applied properly to sales of **tires** because neither quantity, nor discount, nor use by consumer has ever been a factor in this particular industry's recognition of what are, and what are not, retail sales.

Unfortunately, because of our general policies regarding the destruction of records, we are not able to go back much more than twenty years, and in some instances much shorter periods, but such period should be more than ade-



*Defendant's Exhibit J—de Bruin*

quate to demonstrate the uniform practice in this particular industry.

**a. Industry Practices Under NRA Codes.**

It will be recalled that the abnormal business conditions of 1933 brought about the passage of the National Industrial Recovery Act (NRA) in June of that year. Said Act encouraged a wide variety of business and industrial groupings to adopt, by purely voluntary collective action, so-called Codes of fair competition which, when approved by the President, were binding upon all persons engaged in such businesses or industries.

There was approved, on May 1, 1934, Code #410 covering the "Retail Rubber Tire and Battery Trade." This Code is significant because in Section 1 (a) of Article I it states:

"The term 'Retail Rubber Tire and Battery Trade' or 'Trade' as used herein shall mean the **sale** or offering for sale to the **ultimate consumer** and **not for resale** purposes."

It will be noted that the only distinction made in this Code was that between **sales for resale** and sales to the **ultimate consumer, all of the latter being retail sales**. It will be obvious that this Code, which covered all tire dealers who were not engaged exclusively in sales for resale purposes, followed the practice which had theretofore existed in connection with the business of such dealers. As shown by Goodyear Exhibit 4 attached hereto, being a Goodyear Store Profit and Loss Statement for the month of December, and year to date, 1934, **all** sales of tires, whether passenger or truck, were broken down into "DEALER" sales and "RETAIL" sales. (Though unimportant here, the same was true



*Defendant's Exhibit J—de Bruin*

of sales of batteries.) All of the named companies followed the practice required by the Code, namely, that of treating, as retail, sales which were made to consumers.

**b. Store Practices Following NRA and to the Present.**

After the NRA was declared unconstitutional in 1935, there was no substantial change in the accounting practices used by the stores of the named companies and we believe that the same is true as to independent dealers. In all respects, the company stores continued to make the same simple differentiation between sales to consumers (retail) and sales for resale (wholesale). We are attaching a number of exhibits, but some companies are able to produce more records than others. Such exhibits, and the explanatory notes attached thereto will conclusively establish the following:

(1) Prior to the passage of the FLSA in 1938 the company stores either in their sales tickets or in their accounting procedure (including profit and loss statements), or in both, uniformly **recognized but two classes of sales**, namely, **dealer sales** (which are sales for resale) and **retail or consumer sales**. Sales to consumers were classed as retail sales, regardless of quantity, price, or size or type of tire involved in the sale or the use to which the tire was to be put. The store manuals of instruction regarding the keeping of accounts were based upon the same distinction between wholesale sales and retail sales. It will be noted from the exhibits that the operating statements cover various years prior to the passage of the original Act (and, as will hereinafter be noted, also cover years between such date and the 1949 amendments, as well as thereafter.)

*Defendant's Exhibit J—de Bruin*

(2) After 1938, but before the passage of the amendments to the FLSA in 1949, the industry continued its practice of record-keeping as described above and continued to treat, for every purpose and in all respects, all consumer sales as retail sales. Part of the attached exhibits cover various years during this period and fully confirm our statement that for the above-named period the term "retail sales" had a well-defined and well-understood meaning in the tire industry and that such meaning was uniformly recognized in such industry. Even though the Administrator, under the original FLSA, had created a new classification ("non-retail"), which was theretofore unknown to the tire industry and with which the tire industry did not agree, nevertheless this particular industry continued to keep its records and to treat its transactions as it had done before but with such supplementary information as was necessary to furnish the Administrator with the six months records on "retail" and on "non-retail" which he demanded.

(3) Neither the procedure nor the recognition has changed since the 1949 amendments, and the tire industry continues to recognize today what it has recognized for many years, namely, that, sales of tires to consumers, including commercial sales, are retail sales regardless of use, quantity or discount and that sales of tires for resale are wholesale.

While we have not made an investigation of any substantial number of tire dealers, it is safe to state that a high percentage of the independent dealers have followed and do follow, in a general way, the accounting systems

*Defendant's Exhibit J—de Bruin*

used by the manufacturer from whom they purchase tires, especially where such manufacturer also operates its own stores. Irrespective of accounting systems, it is safe also to state that the independent tire dealers have made and do make the same distinction between wholesale and consumer sales as is made by the named rubber companies. We will not labor this point, however, because we assume that independent tire dealers will be given an opportunity to present their facts, either individually, through small groups, or through the National Association of Independent Tire Dealers, with which latter organization, according to the public press, the Administrator already has had numerous contacts on this subject.

**5. Leases Based on Percentage of Sales.**

As further indication of the recognition by the tire industry of commercial sales being retail sales, we call attention to the method of leasing used by company stores and by many independent tire dealers. A high percentage of the stores where tires are sold, whether operated by independent dealers or the named companies, are leased from the owners of the premises. Of course, the provisions of such leases vary with the particular set-up involved, but a large portion of such leases base the rental on the sales made by the store. Some of such leases contain provisions for a stated percentage of the annual net retail sales only and others provide for a stated percentage of the annual net retail sales and a substantially smaller percentage of annual net wholesale sales. It goes without saying that the landlord, of necessity, is most vitally interested in the distinction between retail sales and wholesale sales, and, therefore, the leases leave nothing to conjecture as to what is retail and what is not retail.

As illustrative of the provisions of such leases, we quote the following from the standard Firestone lease, which is

*Defendant's Exhibit J—de Bruin*

typical of such provisions as demonstrated by one of the B. F. Goodrich exhibits:

“In addition to the monthly rental payments hereinabove provided for in this lease, TENANT agrees to pay to LANDLORD the following contingent rental payments based upon **net retail and net wholesale sales**.

Said contingent rental shall be that sum by which three per cent (3%) of annual ‘net retail sales’ and one per cent (1%) of annual ‘**net whole-sale sales**’ exceeds the minimum guarantee paid annually under Section 5 of this lease.

The term ‘**net retail sales**’ as used in this lease shall include **all retail sales and service** for cash or credit **rendered to the public** by the store operating on demised premises **but not including sales to dealers**.

The term ‘**net wholesale sales**’ shall include **all wholesale sales and service to dealers** for cash or credit rendered by the store operating on demised premises subject to earned bonus and other quantity discounts.

There shall be deducted from all said sales, price, credit, and merchandise adjustments including goods sold on approval and later returned or repossessed, uncollectible accounts, excise tax, and any tax based upon or measured by said sales or receipts from sales made by TENANT which is added to or made a part of the purchase price, whether included in billing price or stated separately. Sales and service to \* \* \* (certain specified accounts) and to other stores of TENANT shall not be included in either ‘**net retail sales**’ or ‘**net wholesale sales**.’

\* \* \* \* \*

It is understood and agreed by LANDLORD that TENANT has made no representation of any kind as

*Defendant's Exhibit J—de Bruin*

to minimum or maximum annual volume of **retail and wholesale** sales which TENANT may or shall make any lease year during the term of this lease. LANDLORD agrees not to divulge to any person or persons, firm or corporation, the amount of **net retail and wholesale sales** made by TENANT in said leased premises.”

It will be readily apparent that, with the exception of the specifically excluded accounts, all sales to consumers are retail sales and that it makes no difference whatever to either the landlord or the tenant whether such sales are made in large quantities, at varying prices, or what use is to be made of the tires. “Net retail sales” clearly include sales to local commercial accounts, regardless of whether they buy with or without a contract and wholly irrespective of the quantities which may be purchased at any one time or during a period of time and wholly irrespective of the prices at which the tires may be purchased.

Some leases of the above type have been in effect for about as long as tires have been sold through company stores and probably have been in effect for as long as dealers have sold tires.

**6. Conclusion.**

We respectfully submit that there can be no doubt but that, by the 1949 amendments to the retail establishment provisions of the FLSA, Congress intended to exempt consumer sales where such sales had been, and are, recognized in any particular industry as retail sales and that there was to be no limitation thereon as long as such sales were clearly and easily recognized as retail in the particular industry involved. We further submit that for more than twenty years the tire industry has uniformly recognized that sales for resale are wholesale, and that sales of tires

*Defendant's Exhibit J—de Bruin*

to consumers are retail irrespective of the character of the purchaser, the use to which the tires will be put, the quantities purchased, or the price paid for such tires. This uniform recognition antedates the passage of the original FLSA, continued after the passage thereof and up to the time of the 1949 amendments, and has continued since such amendments to the present time.

Finally it is respectfully submitted that we know of no situation in any industry which could present a more uniform and lasting recognition of all consumer sales as retail sales than is presented by the tire industry.

Respectfully submitted,

.....  
GEORGE T. KILMON,

Attorney, The B. F. Goodrich Company.

.....  
WALTER E. de BRUIN,

Attorney, The Goodyear Tire & Rubber  
Company.

.....  
RAY SHAFFER,

Attorney, The General Tire & Rubber  
Company.

.....  
HENRY S. BRAINARD,

Attorney, The Firestone Tire & Rubber  
Company.

*Defendant's Exhibit Q—de Bruin*

**DEFENDANT'S EXHIBIT Q—WALTER E. de BRUIN.**

September 5, 1958

Memorandum for the File.

Re: Conference with representative of the Department of Labor, Thursday, September 4, 1958, 10:00 A. M., Room 5419, Department of Labor, Washington, D. C.

Messrs. George Kilmon, Harold Mull, Ray Shaffer and the writer, representing Goodrich, Firestone, General and Goodyear, respectively, met Mr. Joseph Goldberg as agreed in the Department of Labor offices. He invited the following members of the Department of Labor to participate in our informal discussions—Mr. Jacob Rubenstein (apparently a division head and Goldberg's superior), Mr. Harry A. Tuell, Solicitor for the Department of Labor, and Mr. Hamnerman, apparently some subordinate of Mr. Goldberg's who had been active in framing the proposed regulation.

Representing the companies, I stated that we had received the proposed regulations determining what a retail sale was in the automotive tire trade and we noted that it stated investigation had been made and that these proposed regulations were the result of such investigation. I stated that in accordance with our brief, we knew of no practice in the tire industry which would support such conclusions and we were interested in the type of investigation that had been made, whether hearings had been held, and what type of supporting evidence had been obtained. After some attempt to answer my question generally, Mr. Mull asked if they had ever prepared a written summary of their investigation. Mr. Goldberg stated that they did not have a formal report but this was a sum-



*Defendant's Exhibit Q—de Bruin*

marization of what they were able to gather from other agencies and practices and that they had a backing up of these various conclusions (it became apparent that the group had taken the general desire of the Secretary of Labor to use prices and quantities as a measuring stick of retail business and to supply them in the tire industry as they had previously applied them in several other industries for which similar regulations have already been issued).

After all of us had indicated dissatisfaction with the proposed regulations, we were invited to discuss the separate divisions, to indicate problems which we felt they presented. We stated that we still felt the history of the legislation showed the congressional intent not to use prices or quantities as the Secretary of Labor had contended, and that the section in the amendments to the Fair Labor Standards Act which provided for recognized retail sales or services **in the particular industry** protected particular industry practices. Then Mr. Kilmon spoke of their subparagraph 2 which had to do with sales made pursuant to formal invitations to bid. He pointed out that in many cases invitations to bid, and particularly national account sales in their subparagraph 3, were handled by the central office or by a division point and that the only participation a local store had in such cases was perhaps furnishing a small amount of tires under that order. Mr. Tuell mentioned that the Département had always taken the position that on sales such as national account sales the store should be charged, for purposes of determining its percentage of retail business, with the total amount of the sale in which they participated, even though they only got a handling charge or a commission and had nothing to do with the invoicing or billing of the sale. Upon our expressing surprise and shock at that interpretation, he admitted that it



*Defendant's Exhibit Q—de Bruin*

had been tested in Court and that the District Court had disagreed with their viewpoint and that they had never carried it further, but they must insist on that interpretation. In discussing the subsection for fleet accounts, we pointed out the ambiguity of such phrases as wholesale prices or prices typically charged on sales for resale. We pointed out that in the present buyer's market a price for one tire might vary between two customers in the same store, depending upon the sharpness of their bargaining ability. We pointed out that we did not use fleet prices. At this point Mr. Rubenstein stated that under OPA the industry had used a similar definition of "fleet" as an owner or operator of five or more trucks. We stated that we could see no connection between a law which was used to regulate maximum prices by the Government and was imposed on industry and the present industry practices, even if there had been such a precedent. We further stated that we had no knowledge of specific fleet price or fleet quotations.

We then skipped over to those provisions of the proposed regulation which had to do with retreading or recapping. It was pointed out that none of us had any disagreement over large regional retread plants since there could be no question of their type of business. We stated, however, that there was considerable doubt in our minds covering store locations which had, as a department, a retreading operation. It was pointed out that in many of these stores a customer might wish to have his smooth tires recapped but be unwilling to wait or to return, and the store might take his casings, giving him in return other casings that had been recapped. Mr. Rubenstein asked if it wasn't true that in such recapping departments their hours might be more regular than other departments, and it was pointed out that that was probably not true. It was pointed out

*Defendant's Exhibit Q—de Bruin*

that in cases of approaching busy seasons, such as recapping of tires with winter treads, we might find instances of extreme variation of hours by employees in retreading departments. We stated that we felt their proposed regulations would make it difficult for people in our positions who, from a central office, were attempting to police our various locations. It was pointed out that it would be almost impossible for us to protect ourselves against some eager store manager who might handle retreads in such a manner that we could not tell whether they were actually returned to the customer or sold to other customers. This point seemed to draw some attention of Mr. Goldberg and he seemed generally sympathetic.

The meeting concluded after about two hours with their suggestion that we submit some proposed amendments to their regulations. We stated that we would like to consider that in caucus. The representatives of the Department then suggested that we consider that over the lunch hour and that, if we wanted to confer further, they suggested a two o'clock meeting. They said, however, if we wished to submit a further memorandum on the subject we could advise them by telephone.

At our lunch the representatives of the companies decided that there was no point in further conference but that we should ask them for an additional 30 days in which to decide whether we would file additional memoranda or not. Mr. Goldberg's office was so advised.

Attorney.

W. E. de BRUIN.

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*Defendant's Exhibit R—de Bruin*

**DEFENDANT'S EXHIBIT R—WALTER E. de BRUIN.**

The Goodyear Tire & Rubber Company  
Akron 16, Ohio

October 9, 1958

Mr. Joseph Goldberg

Wage & Hour & Public Contracts Division

United States Department of Labor

Room 5419

Washington 25, D. C.

Re: Proposed Amendments to Part 779 of Title 29 CFR  
Regulations Pertaining to Automotive Tire Trade.

Dear Mr. Goldberg:

You will recall that at our request you were kind enough to arrange a meeting at which the undersigned, as representatives of our respective companies could discuss with you and some of your associates the above-mentioned regulations. At the conclusion of that meeting you invited us to submit in writing any further comments that we might care to submit on this subject. That is the purpose of this communication.

During the course of our conversation, and in answer to our inquiry concerning the factual basis for your proposed regulations (which indeed submit a new concept of retail and wholesale sales into our particular industry), one of your associates suggested that there was some support for such distinctions in the rubber industry practice under OPA and its accompanying regulations. Without in any way admitting that such an analogy was sound or reasonable, we asked for more detail, but none was furnished. We therefore asked for some time in which to canvass our respective companies on this matter.

In the relatively short period of time available to us since our conference, each of us has attempted to canvass his respective company. Upon comparing notes, however,

*Defendant's Exhibit R—de Bruin*

we have discovered no such support as was indicated might exist for the position which your department has proposed to take. For instance, our sales people have pointed to official documents of OPA which they say are representative of the practice in the tire industry during the entire life of OPA. In RPA 63, issued on February 13, 1943, by the Office of War Information for OPA, Part 1315—Rubber and Products and Materials of which Rubber is a Component, Section 1315.108 Definitions (2) reads as follows:

“ ‘Sale at retail’ means any sale to a purchaser for use by such purchaser and not for resale.”

Again NPR 143, issued April 2, 1943, by the same Office of War Information for OPA, Part 1315.1510 contains as subparagraph 3 the identical definition of sale at retail as quoted above following paragraph (2), which reads as follows:

“(2) ‘Sale at wholesale’ means any sale, other than a sale to a vehicle, manufacturer for original equipment of such vehicle, except a sale at retail.”

The OPA regulations and practice therefore support our view that all sales to consumers for their own use have been recognized as retail sales in the tire industry for many years. Your proposed regulations entirely disregard this industry practice, contrary to the Congressional intent and the specific wording of Section 13a (2) of the Fair Labor Standards Act as amended. We recognize the possibility that we may have misunderstood your reference to the OPA practice. Therefore it would be greatly appreciated if you could furnish us more detail either concerning the reference of your associates to the practice of the tire industry under OPA administration or more generally concerning any of the other factual findings for our industry upon which the proposed regulations are founded.

This matter is of deep concern to the tire industry. We believe that the record will show our acceptance of and

*Defendant's Exhibit R—de Bruin*

compliance with the Fair Labor Standards Act and its amendments. The Administrator has invited our suggestions and comments on these proposals and we have accordingly given this matter our most serious consideration. We would indeed be remiss in our duty if we did not express our sincere conviction that not only are these proposed regulations unworkable, but they are entirely contrary to the practice which has prevailed for a great number of years in the tire industry.

All of us realize how much simpler and more satisfactory it is if differences of viewpoint may be worked out in advance of the issuance of regulations. Knowing that your department must share this view, we sincerely hope that you can give us the information which we have requested here. Further than that, if you feel that more complete information on this subject can be gained either by a general hearing for the industry or by further conferences with us, we are anxious to make ourselves and our information available for that purpose.

Sincerely,

.....  
GEORGE T. KILMON,

Attorney, The B. F. Goodrich Company.

.....  
HENRY S. BRAINARD,

Attorney, Firestone Tire & Rubber  
Company.

.....  
WALTER E. de BRUIN,

Attorney, The Goodyear Tire & Rubber  
Company.

.....  
RAY SHAFFER,

Attorney, The General Tire & Rubber  
Company.

*Defendant's Exhibit S—de Bruin*

**DEFENDANT'S EXHIBIT S—WALTER E. de BRUIN.**

U. S. Department of Labor  
Wage and Hour and Public Contracts Divisions  
Washington 25, D. C.

Nov. 25 1958

Office of the Administrator

Mr. Walter E. de Bruin, Attorney  
The Goodyear Tire & Rubber Company  
Akron 16, Ohio

Dear Mr. de Bruin:

This is in reply to your letter of October 9, 1958, addressed to Mr. Joseph Goldberg of my staff, concerning the proposed determination on the application of the 13 (a) (2) and 13 (a) (4) exemptions under the Fair Labor Standards Act to the automotive tire trade.

The views expressed in your letter as well as in the brief previously submitted and in the conferences and correspondence with the Divisions will be given careful consideration in reaching a decision on this matter. I note particularly your reference to classifications by the OPA. I am informed that the reference made to the OPA at the September 4, 1958, conference which you had with members of my staff concerned only the definition of "fleet account" as contained in the proposed determination. As you know, in developing the proposed determination, consideration was given also to classification of other agencies including the Economic Stabilization Agency, the SIC and the Census as well as the views and evidence of recognition furnished by other members of the industry and other interested parties.

*Defendant's Exhibit A—Marsh*

We believe that an adequate opportunity has been given to all to present the facts, evidence and information bearing on the determination as to what sales and what establishments "are recognized as retail" in this industry. You will be informed when final action is taken.

Very truly yours,

CLARENCE T. LUNDQUIST,

Administrator.

cc: Mr. George T. Kilmon, Attorney.

Mr. Henry S. Brainard, Attorney.

Mr. Ray Shaffer, Attorney.

(Emblem)

**DEFENDANT' S EXHIBIT A—WINSTON W. MARSH.**

National Association of Independent Tire  
Dealers, Inc.

Executive Office . . 1302 Eighteenth Street, Northwest  
Washington 6, D. C.  
Telephone: HUDson 6100

February 21, 1950

Administrator, Wage Hour Division  
Department of Labor  
Washington, D. C.

Dear Sir:

I would appreciate your opinion as to the applicability of Section 13 (4) of the Amended Wage-Hour Act to the employees of retail tire dealers in the light of two situations prevalent in the industry.

*Defendant's Exhibit A—Marsh*

The members of our Association are classified as "independent tire dealers." Their primary function is to buy tires from the manufacturers at wholesale and to sell them to other dealers or to the consuming public. Essentially, they fall within the classification of wholesalers or retail merchants. They are not mere gasoline "service stations," although they may also sell gasoline as a service station would.

(1) **Vulcanizing and Recapping Service by Tire Merchants.** One of the situations that prompts this letter is the fact that many of our members, in addition to selling new tires to the ultimate purchaser or other retailers, perform vulcanizing and recapping services. Paragraph 71 of Interpretative Bulletin No. 6, originally issued in December of 1938 and revised in June 1941, had this to say about section 13 (a) (2) of the Act prior to the recent amendments:

Section 13 (a) (2) does not apply to establishments engaged in tire retreading or tire recapping. Such processing activities involve the rebuilding of tires and are seldom performed by the ordinary garage, tire dealer, or service station. Tire dealers and service stations sometimes accept tires for retreading or recapping, but usually the work is performed by an independent tire retreader or recapper.

This is not only erroneous in point of fact but it seems to say that any establishment engaging in tire retreading or tire recapping cannot be classified as a retail establishment. So far as it does so, we think it misconceives the nature of vulcanizing and recapping.

"Vulcanizing" is the process of repairing a tire by fastening new rubber, or cord, or both to weak spots by means



*Defendant's Exhibit A—Marsh*

of heat. The process is very simple and the tools required are few and inexpensive. Many service stations perform this type of service. The overwhelming preponderance of our members engage in vulcanizing as a service to the customers. Some vulcanizing repairs replace scuffed or cut rubber, or cord, in the shoulders, side-walls, or tread of the tire. Where the tread is seriously worn, the term usually applied to the repair of the tread is "recapping." Not only are vulcanizing and recapping actually repair services, but they are regularly performed by tire dealers. In the latter connection the official **Standard Industrial Classification Manual**, obtainable from the Government Printing Office, recognizes that tire dealers (Industry 5531) have facilities for "tire recapping and vulcanizing" and that "tire repair shops" engage in "repairing and retreading" (Industry 7534) whereas "establishments primarily engaged in retreading automobile tires on a factory basis" are a separately classified rubber industry (Industry 3099).

Tire repair and vulcanizing is a service operation which starts in a simple manner with the small service station and garage. There the injured tire, which probably has broken cords caused by a bruise or penetration from some foreign object, is removed from the wheel, disassembled and repaired. Such repair can be so simple as the use of a "boot" or small cord patch, which is laid in the tire with cement or gasoline. Some devices are marketed to provide better facilities and tools for this job such as a small hand spreader, work bench, mandral, stitcher, etc. The more aggressive operator can install, without too large an investment, a small electric mold or press on which a semi-cured repair unit can be quite satisfactorily cured in the tire, restoring it to full and lasting service. This type of service operation is a graduated step from the simple service station operation on the one hand to the large tire

*Defendant's Exhibit A—Marsh*

dealer who offers "one day service" with a varying arrangement of electric or steam molds designed to handle even the largest size of truck or off-the-road tires. This work is performed in the same manner with new live cord replacing the damaged and broken cord within the tire. Equipment used in the larger establishments is generally accurately controlled by means of gauges, regulators, check valves and traps and operated by an experienced technician—but the principle of operation remains the same as those used in the simple service station type of repairing mentioned above.

As stated above, some repairs replace scuffed or cut rubber in the shoulders and tread of the tires. This is "recapping." As long as the cord of the tire is sound, it is economical to replace the scuffed rubber on the tread of the tire with the service known as recapping. Since the cord body of the tire represents almost two-thirds of the initial cost of the tire, any step taken to protect that investment is wise as well from the point of safety, particularly since smooth tires skid much more easily in any kind of weather than tires with some tread. Recapping service has become popular to the point that "8-hour recapping" is featured by many tire dealers. The customer's car is jacked up during the day while the tires are being repaired or recapped much in the manner that the shoe repair shop offers service to the public. Indeed, the accepted vernacular for tires is "shoes".

As previously mentioned, this recapping operation consists of replacing tread on a tire in approximately the same manner that a tire is repaired, after which the stock used is cured in a mold or steam chamber. Tubes, rubber boots, aprons, rubber industrial products, etc., are treated and cured in exactly the same manner and this is a commonly

*Defendant's Exhibit A—Marsh*

accepted service. The addition of a "knobby" or snow tread for the winter months is also a practice gaining in popularity in the recapping field. The service possibilities of the tire recapper-repairer are extensive and growing both in the simple service station operation and the larger tire shop.

"Recapping" as done by our members can be classified in three categories. (1) If the owner of a tire worn smooth by use wishes to have a new tread placed upon the tire, he may take his tire to the establishments of our members and they will replace the tread. This is akin—as we have said—to the situation of a man taking his shoes to a cobbler to be repaired or resoled. This type of service may be designated as "service recapping". (2) Another type may be called "retail recapping". It is the custom in the industry to allow a trade-in allowance on old tires when new ones are purchased. Many of the tires turned in are in need of recapping service. Accordingly, many of our members "recap" the tire before offering it for sale second-hand. (3) A third category is "wholesale recapping". Some of our members, although their principal interest is in selling tires, not only engage in "service" and "retail" recapping for themselves, but they also recap tires at the request of other tire dealers who for some reason prefer not to perform such a service themselves.

For present purposes, it may be assumed that: (1) Over 50% of the establishment's annual dollar volume of sales are made within the state in which the establishment is located. (2) Seventy-five per cent of its annual dollar volume of sales are not for resale. (3) Seventy-five per cent of the establishment's annual dollar volume of sale are recognized in the particular industry as retail sales. (4) The establishment is recognized as a retail establishment in its

*Defendant's Exhibit A—Marsh*

particular industry. (5) More than 85% of the establishment's annual dollar volume of sales of goods which it makes or processes are made within the state in which the establishment is located. (6) The goods which the establishment makes or processes are made and processed at the establishment which sells the goods.

In this setting our questions in regard to vulcanizing and recapping service as it affects the applicability of section 13 (4) of the amended Act are as follows:

**First:** Does the mere fact that a store performs vulcanizing and recapping services remove it from the retail exemption?

The Conference Report states, with reference to section 13 (4) of the amended Act, that:

This exemption will apply typically to bakery establishments which bake the breads and pastries which they sell, ice plants which manufacture the ice they sell, and ice cream parlors or candy kitchens which make their own ice cream or candy.

We would like to know if vulcanizing is also considered in that exempt category. Vulcanizing is merely a repair service, as compared with the manufacture inherent in a bakery or ice cream or candy plant; it is sold as a service, whereas the latter are sold as commodities produced by the retailer. For that reason the situation of our member retailers seems to us an a fortiori one. We would have no doubts on this score if it were not for Paragraph 71 of Interpretative Bulletin No. 6, described above.

**Second:** If vulcanizing and recapping do not per se disqualify a retailer from coming within the exemption of section 13 (4), would a retailer tire dealer be removed from the exemption by engaging in any of the types of recapping

*Defendant's Exhibit A—Marsh*

described above as (a) service, (b) retail, or (c) wholesale? Here we think the same essential considerations apply as in the case of vulcanizing.

(2) **Prior Differentials.** The second situation prompting this letter is the custom in the industry to sell at a price which declines as the amount of tires purchased by a buyer increases. In other words, consumers are customarily given a discount proportioned to the size of their orders.

The pricing structure of the rubber tire industry is intricate. Every rubber tire manufacturer provides his dealers with a suggested list price for both passenger and truck tires which is used for two purposes. From this list price dealer cost discounts are computed in sales by manufacturers to dealers. From the same list prices dealer discounts in their sales to consumers are also calculated. There is a peculiar nomenclature used in the industry to describe the amount of these consumer discounts, usually in terms of 10%. The first discount is usually 10% of the suggested list price. The second discount is usually 10% of the price after the first 10% discount has been deducted. This is described as "10 and 10" and means ten per cent off the list price after the deduction of the original 10 per cent discount. If a further discount is made it is designated by similarly deducting another 10% or 5%. Thus if a large purchaser were offered what is described as a 10-10-10 discount, it would mean that 10% would be discounted from the original price, 10% from the resulting price and a final 10% from the latter figure.

The manufacturer recommends to his dealers that a discount or trade-in of 10% or 10 and 10% be offered consumer purchasers of **passenger** tires in order to obtain their business. The same pricing practices obtain for **truck** tire

*Defendant's Exhibit A—Marsh*

business. Recommended discounts for truck tires to the commercial users are 10-10%, with a suggested 10-10-10% for the larger fleets and 10-10-10-10% where delivery is made to "national" accounts such as Swift & Co. operating motor vehicles in many places. (One larger tire manufacturer has a discount program of 10-10-10-5%, with an increase to as much as 10-10-10-10-10-5% for the very large buyer; if the dealer sells at this latter discount, he can replace his stock from the manufacturer at a corresponding discount.) Technically, the independent tire dealer can refuse to deliver his merchandise to consumer purchasers at these discounted prices, but he makes such a decision with full knowledge that the company-owned store of one of the tire manufacturers will quickly take over the account and might even quote a larger discount.

Again, many of our members sell tires in large quantities to trucking companies at a special discount from the list price, both the discount and the list price being suggested by the manufacturer.

The prevailing market price of truck tires is substantially below the aforementioned suggested list prices. The reduction is offered because of the advantages stemming from the large volume sale. Fair Trade Acts are not pertinent. (Since the sales are direct from the tire dealer to the ultimate consumer, the sales have always been considered as "retail" in the industry and would appear to be truly of that nature.) But a problem arises in this connection because of paragraph 70 of Interpretative Bulletin No. 6, which states that "nonretail sales" include:

(2) sales to business or industrial purchasers in quantities materially in excess of the quantities normally purchased by individual purchasers and at a special discount from the regular retail price, and (3)

*Defendant's Exhibit A—Marsh*

sales of the type of goods, such as heavy truck or bus tires, not purchased by the general consuming public.

Bus, as stated above, the reduction offered in such sales as described in (2) and (3) of paragraph 70 are offered in order to obtain business rather than because the sale is something other than a retail transaction.

**The question** we have in this regard is: What is the opinion of the Administrator in relation to the nature of large volume sales made at a generally recognized and applicable discount to large trucking concerns and to commercial or industrial user-purchasers? (As previously stated, such sales are, and are considered in the industry to be, retail sales—but Interpretative Bulletin No. 6 evidently treated such sales as "wholesale.") Does the Administrator now consider such sales as "retail" or "wholesale" business? If the latter, what may we do to have the facts re-examined and a fresh interpretation issued?

We will be glad to supply you with further information or aid in this connection.

Very truly yours,

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

W. W. MARSH,

General Manager.

ds



*Defendant's Exhibit B—Marsh*

**DEFENDANT'S EXHIBIT B—WINSTON W. MARSH.**

U. S. Department of Labor  
Wage and Hour and Public Contracts Divisions  
Washington 25, D. C.

Office of the  
Administrator

Dec 15, 1950

Mr. W. W. Marsh  
General Manager  
National Association of Independent Tire  
Dealers, Inc.  
1302 18th Street, N. W.  
Washington 6, D. C.

Dear Mr. Marsh:

An Interpretative Bulletin regarding the application of Sections 13 (a) (2) and 13 (a) (4) of the Fair Labor Standards Act to retail and service establishments generally has recently been issued. That Bulletin does not cover many details of the application of these exemption provisions to specific types of operations in the automobile tire trade.

To provide a basis for a more detailed interpretation of the application of the exemption provisions in that industry, I have asked our Division of Research and Statistics to prepare an analysis of the pertinent factual data. Among the factors to be considered are the views of trade associations as to what types of sales or services are recognized as retail sales or services, and what types of establishments are recognized as retail establishments in the industry.

To assist in completing this study, I would greatly appreciate your furnishing, at your earliest convenience, a statement setting forth in detail the views of the National



*Defendant's Exhibit B—Marsh*

Association of Independent Tire Dealers, Inc., on the questions listed in the enclosed questionnaire, as well as on other pertinent points, and the basis for the Association's conclusions, including supporting data.

Already available for this purpose is your letter to me dated February 21, 1950, which bears on these questions. The information contained in that letter need not, of course, be repeated.

The statement should be addressed to Mr. Max Schiferl, Acting Director, Division of Research and Statistics, Room 5138, Department of Labor Building, Washington 25, D. C. Should you have any questions regarding the type of statement which would be most useful, I suggest that you take these up with Mr. Schiferl by calling Executive 2420, extension 1306.

Yours very truly,

WM. R. McCOMB,  
WM. R. McCOMB,  
Administrator.

Enclosure: "Questions Pertaining to the Automobile Tire Trade."

Questions Pertaining to the Automobile Tire Trade.

A. Automotive Parts, Accessories and Tires.

1. What proportion of the sales of automotive parts and accessories and/or tire distributor-dealers are made to commercial, industrial, governmental or institutional customers?

2. On the average, what proportion of the sales of tire, battery and accessories dealers are for resale or of a type not recognized as retail in the industry? How does the Association distinguish between sales of parts that are

*Defendant's Exhibit B—Marsh*

recognized as retail and those that are not so recognized in the industry?

3. What proportion of automotive parts and accessories and/or tire dealers make at least 75 percent of their sales not for resale and of a type recognized as retail in the industry.

4. What is the pattern of discount practices in the sale of automotive parts and accessories:

a. to dealers for resale?

b. to commercial, industrial, governmental or institutional customers?

c. to personal consumers?

5. In the letter of the National Association of Independent Tire Dealers, Inc., dated February 21, 1950, there are mentioned various discounts in sales of truck tires in terms of "10-10-10 percent" to larger fleet users, and "10-10-10-10 percent" to national accounts, such as Swift and Company, operating motor vehicles in many places. Does the Association consider such sales to be wholesale or retail sales? Do these sales involve a contract under which certain firms agree to buy either specified quantities, or total requirements for a stated period? Who are the contracting parties? Could you furnish any facts regarding such transactions?

**B. Tire Vulcanizing, Retreading and Recapping.**

6. In the letter just mentioned reference is made to vulcanizing, retreading and recapping as if these operations were identical. What exactly is the difference between these three processes? Do tire dealers do retreading and recapping as well as vulcanizing?

7. Are the processing operations in vulcanizing, retreading and recapping similar to those in manufacturing new

*Defendant's Exhibit B—Marsh*

tires? In what ways are they similar and in what ways different?

8. Again referring to the letter of February 21, what is the difference between the tire vulcanizing, retreading and recapping operations performed by the larger tire dealer in his shop equipped with "steam molds designed to handle even the largest size of truck or off-the-road tires" and with equipment "accurately controlled by means of gauges, regulators, check valves, and traps"—and the operations in establishments primarily engaged in vulcanizing, retreading and recapping tires on a factory basis? Just what is meant by "factory basis"?

9. How does the machinery of a tire vulcanizing, retreading, and recapping factory differ from that of a large tire vulcanizing, retreading, and recapping shop operated by a tire dealer? How do the operations differ? Is there any difference in the training and ability required of the worker?

10. Are tire vulcanizing, retreading, and recapping shops operated by tire dealers separated from the tire store? Which of the employees who work in the store also perform functions in connection with the work of the vulcanizing, retreading, and recapping shop?

11. On the average, what proportion of the tire dealers' total receipts is derived from vulcanizing, retreading, and recapping:

- a. tires owned by customers?
- b. tires owned by themselves and reconditioned for sale?
- c. total tires?

12. On the average, what proportion of tire dealers' total receipts is derived from vulcanizing, retreading, or recapping customer-owned tires:

*Defendant's Exhibit C—Marsh*

a. for other dealers?

b. for fleet operators, trucking firms, bus and taxi companies?

c. for other commercial, industrial, governmental and institutional customers?

d. for personal consumers?

13. Is the vulcanizing, retreading, or recapping by tire dealers of tires owned by fleet operators, trucking firms, bus and taxi companies, or by other commercial, industrial, governmental or institutional customers considered a whole-sale or a retail transaction?

14. Is the vulcanizing, retreading, or recapping by the dealers of customer-owned tires, on a contract basis as a result of competitive bidding for commercial, industrial, governmental or institutional customers considered a whole-sale or a retail transaction?

15. Is the sale by tire dealers of tires which they have vulcanized, retreaded, or recapped ever considered a retail transaction? Are establishments operated by such dealers recognized as retail establishments in the industry?

**DEFENDANTS' EXHIBIT C—WINSTON W. MARSH.**

January 19, 1951

Mr. Max Schiferl

Acting Director

Division of Research and Statistics

Room 5138, Department of Labor Building

Washington 25, D. C.

Dear Mr. Schiferl:

In a letter dated December 15th, signed by Mr. McComb, the administrator of the Department of Labor, this office

*Defendant's Exhibit C—Marsh*

was requested to dig up some material and answer some 15 questions relative to the Wage-Hour Law as interpreted for the retail tire industry.

We have been giving this matter our very careful consideration and have honestly and sincerely tried to answer these questions in the manner the request indicated. You can be sure that if there is further information or other material that we can bring to light which will help you, we would be pleased, not only to come to the Department of Labor for any conference that you might want held, but to develop further information which might help you get a clear picture of the retail tire industry as we know it.

Sincerely yours,

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

W. W. MARSH,

General Manager.

np

cc: Mr. McComb.

Mr. Kimble.

1. By and large automotive parts are not a functional part of the items offered for sale by the tire dealer. Tire dealers do, however, sell some automotive accessories. Industrial, governmental, and institutional sales are classed with trucking accounts as commercial sales. The percentage of volume in such commercial sales ranges from around 17 percent in the case of dealers doing less than \$15,000 annual volume to approximately one-third in the case of dealers doing over \$15,000 annual volume.

2. (We classify a retail sale as one made to the consumer. If a tire is purchased for resale it is counted as wholesale.) Dealers doing less than \$25,000 annual volume

*Defendant's Exhibit C—Marsh*

sell from 5 to 20 percent of their tires at wholesale. Those are usually small sales made to car dealers for spares, etc., or to small garages, service stations, and the like, and do not constitute a fundamental part of their operation. About 35 per cent of the dealers are in this group. The medium size dealer of from \$25,000 to \$150,000 annual volume does around or sometimes slightly over 25 percent at wholesale. About 55 per cent of the dealers are in this group. The large size dealers with an annual volume of over \$150,000, which comprise about 10 percent of all dealers, do around one-third to as high as about 40 percent of their business at wholesale.

3. Automotive parts dealers cannot be classified with tire dealers. At least 35 percent of all tire dealers make at least 75 percent of their sales not for resale and of a type recognized at retail in the industry.

4. Dealers in automotive parts and accessories are not considered to be tire dealers and therefore we are unable to give an answer to this question.

5. The sales in question to large fleet users and national accounts have always been considered in the tire industry and by the Association as retail sales, since they are made to the consumer. The contracts covering such sales are customarily open purchasing contracts, on occasion are for specified quantities, but practically never are for total requirements. Such contracts usually stipulate the price at a stated discount from list price.

In the case of sales to large fleet users, the contracting parties may be either the manufacturer or the dealer as the seller, and the user as the buyer. Where the manufacturer makes the contract, it or its company-owned stores will in most cases make the deliveries also. In some instances, however, the individual orders under such con-

*Defendant's Exhibit C—Marsh*

tracts will be filled by the dealer, for which he will receive a stipulated discount or percentage. The business of this kind done by dealers represents in general only a small proportion of their total business. To some extent the dealers themselves make such contracts with large fleet users, and, of course in such cases make the deliveries under the contracts. In such instances the dealers must, of course, quote prices comparable to those offered by the manufacturers or they have no chance of obtaining the business. Thus where dealers enter into such contracts the sizeable discounts given are not because such business is considered wholesale, but only because it is necessary to do so to obtain the business in view of the various discounts offered by other interests.

In the case of national accounts, the contracting parties are customarily the manufacturers and the user. The sales or deliveries under the contracts are usually made by the manufacturers themselves or through company-owned stores. A small part of such sales or deliveries, however, are made by independent tire dealers pursuant to the contracts negotiated by the manufacturers. In such cases the dealer fills the order of the local branch of the national account at the price stipulated by the manufacturer and receives a fixed discount or percentage on the sale. In so far as the dealers are concerned their involvement in such transactions constitutes only a small percentage of their business.

(As I pointed out in my letter of February 21, 1950, however, in this industry sales cannot be classified as other than retail on the basis of the size of the discount, because the discount structure is extremely complex and encompasses a myriad of variations. Practically all sales to consumers, even those of one or two tires to an individual user, are made at some kind of a discount.) As the number of

*Defendant's Exhibit C—Marsh*

tires increases the discount will usually increase. This is done not because such sales in particular quantities or to particular kinds of users are considered wholesale, but because as the size of order increases the number of various interests in the industry interested in the business increases, and therefore the larger discounts are necessary to obtain the business. (As stated previously, all of these sales to commercial users, including sales to large fleet users and national accounts, are considered by the Association and the tire industry as a whole as retail sales, for the very practical reason that they are sales to the ultimate consumer.)

6. Recapping and retreading are substantially identical operations. Vulcanizing is somewhat different. Vulcanizing is the process of repairing a tire by fastening new rubber or cord, or both, to weak spots by means of heat. This type of repair is confined to the remedying of injured or bruised spots in an otherwise usable tire. It is a rather small operation and is customarily done on a tire brought in and left for repair by the user. Recapping and retreading consist of replacing the rubber or tread on a tire in which the cord is sound. This is not customarily confined to a single spot on a tire, as is vulcanizing, but involves the addition of an entire new tread or cap. This type of operation is more substantial than the vulcanizing operation, but still not comparable to the manufacture of a tire, since the cord body of the tire represents about two-thirds of the initial cost of a tire. In general, tire dealers do retreading and recapping as well as vulcanizing.

7. The processing operations in vulcanizing, retreading, and recapping are not at all similar to those in manufacturing. Vulcanizing is simply the repair of a spot in a tire. Recapping and retreading are simply the adding of rubber to the shoulders or tread, or both, of a tire. Manufacturing



*Defendant's Exhibit C—Marsh*

involves the much more complex problem of "building" a tire in its entirety, including both cord and rubber. The single similarity in processing is that in vulcanizing, re-treading, or recapping the new rubber added is cured during the operation in much the same manner that it is cured in manufacturing. A good parallel to this operation is that in the shoe repair field. The shoe manufacturer makes the entire shoe, just as the tire manufacturer builds the entire tire. The shoe repair shop repairs holes in shoes, much the same as a vulcanizer repairs bruises or holes in tires. The shoe repair shop also puts on new soles, just as the recapper or retreader puts on a new tread. Vulcanizing, re-treading, and recapping are service operations and are customarily performed on tires brought in by the users.

8. "Factory basis" refers to recapping shops such as those operated by the tire manufacturing companies. The manufacturers have these at strategic locations across the nation and operate solely on a wholesale basis. There they do work for other tire dealers who do not have such equipment. There are a very few independent tire dealers who operate on a similar basis. Most independent tire dealers, however, even including those large dealers who have the type of modern equipment mentioned, do their work on a retail basis for users in the local community.

9. The machinery of a manufacturer doing repairing or recapping on a factory basis is in some cases much the same as that of a large tire dealer operating a local service shop, except that the greater volume of the establishment operating on a factory basis usually requires more machinery. Of course, as among the local dealers the type and amount of machinery vary widely depending upon the volume of repair business done and the size of tires taken in for repair. The operations on a factory basis differ from

*Defendant's Exhibit C—Marsh*

those on a dealer basis primarily in that the former is on a larger scale and at wholesale, whereas the latter operates on a retail basis providing service for users in the local community. In general, there probably is no difference in the training and ability required of the worker.

10. Shop locations vary with every city. While in some instances the repair shops of tire dealers are physically separate from the tire store, they are usually together. Except for the very small one to the three mold shop, recapping personnel confine their efforts to the shop alone.

11. It is impossible to give a full answer to this question because of the great variation as among dealers. Some dealers do not perform any tire repair or recap work. Some engage in that service on a substantial scale. In general, however, it may be said that, taking the total receipts of tire dealers as a whole, the proportion of such receipts derived from vulcanizing, retreading and recapping would be rather small as compared with that received from the sale of new tires. Of the receipts from repairing and recapping, by far the greatest part would be from tires owned by the customer. Some dealers do only such service work. Others do some repair work on tires they take in on trade-in and then resell at retail. But in general this amounts to only a very small percentage of the total amount of repair and recap work done by dealers, and, of course, represents an even smaller proportion of the total receipts of such tire dealers.

12. Again, it is impossible to give a full answer to this question because of the great variation among dealers. On the average, only an extremely small part of tire dealers' total receipts is derived from repairing or retreading customer-owned tires for other dealers. In fact, most tire dealers do not engage in this type of business at all. With

*Defendant's Exhibit C—Marsh*

respect to repairing and retreading customer-owned tires for fleet operators, trucking firms, bus and taxi companies, or for other commercial, industrial, government and institutional customers, it is believed that in the case of a great majority of dealers only a very small part of their total receipts comes from such operations. Some dealers do not perform any tire repair or retread work. Many of those who do, confine such work to personal consumers. There are a few tire dealers, however, who do a substantial amount of repair and retread work for such commercial accounts, but it is believed that even these dealers receive at the most only around fifteen or twenty percent of their total receipts from such commercial retread work. Most dealers who are engaged in repairing and retreading do the greatest part of such work on customer-owned tires of personal consumers. In fact, as said before, many dealers confine their repair and retread operations to such work. Even here, however, the receipts from such work would in most cases represent a relatively small part of total receipts, since by far the greater part of receipts would be from the sale of new tires.

(13. This type of business is considered as retail business in the industry.)

14. Contract recapping is not a factor of any substance in the industry, but to the extent that it exists is considered a retail transaction.

(15. Sales by tire dealers of tires vulcanized, retreaded, or recapped by them and resold at retail have always been considered retail transactions, and establishments operated by such dealers have been historically recognized in the industry as retail establishments. In such a case the dealer customarily takes the used tire as a trade-in on a new tire, repairs it, and then resells it at retail. Since the

*Defendant's Exhibit D—Marsh*

acquisition of the tire is a part of a retail transaction and the sale is also at retail, it would seem clear that the entire transaction should be considered one at the retail level.)

**DEFENDANT'S EXHIBIT D—WINSTON W. MARSH.**

July 30, 1954

Mr. Harry Weiss  
Assistant Administrator  
Wage & Hour & Public Contracts Division  
United States Department of Labor  
Washington 25, D. C.

Dear Mr. Weiss:

I am enclosing a memorandum which I have prepared in conjunction with our attorney and which I believe will demonstrate conclusively that sales to commercial accounts have at all times been recognized as retail sales in the tire industry.

I shall greatly appreciate the opportunity of talking with you after you have read this memorandum, to see if you desire any additional information or if there is anything further we may do.

Sincerely yours,

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

W. W. MARSH,

Executive Secretary.

dl

enclosure

*Defendant's Exhibit D—Marsh*

Memorandum by  
The National Association of Independent Tire  
Dealers, Inc.,  
on  
What "Is Recognized as Retail Sales" in the  
Tire Industry.

≈ Introduction.

The purpose of this memorandum is to demonstrate that throughout the history of the tire industry sales to commercial accounts have been recognized in the industry as retail sales.)

The National Association of Independent Tire Dealers, Inc., believes that it is qualified to speak for the industry, at least for the independent tire dealers, in this respect. It is the sole national organization representing independent tire dealers, and has approximately 2500 members located in various cities and towns throughout the United States.

The problem in question is quite narrow. The pertinent statutory provision specifies, among other things, that retail sales and services are those which are "recognized as retail sales or services in the particular industry." Concerning this provision, the House Managers in their Conference Report stated:

"Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale, so long as such sale or service is recognized in the particular industry as a retail sale or service."

It is thus clear that the "type of customer" makes no difference. The sole question is how the sales have been regarded in the industry—have they been treated as retail

*Defendant's Exhibit D—Marsh*

sales, or as something else. We submit it is clear that in this industry sales to commercial accounts have consistently been regarded as retail sales.

In support of this view we point below to three types of evidence: the treatment of such sales in the NRA Codes; the treatment accorded such sales in OPA price schedules; and the manner in which the independent tire dealers themselves have treated such sales in their accounting records kept in the ordinary course of business.

I.

The NRA Codes for the Tire Industry Recognized  
Sales to All Users, Including Commercial  
Accounts as Retail Sales.

As is well known, the NRA codes were prepared by representative industry groups, and hence provide the best possible evidence of how the industry regarded sales to different classes of customers.

Article I A of Code No. 410, approved May 1, 1934, entitled "Code of Fair Competition for the Retail Rubber Tire and Battery Trade," provided in part as follows:\*

"Section 1. The term 'Retail Rubber Tire and Battery Trade' or 'Trade,' as used herein, shall mean the sale or offering for sale to the ultimate consumer and not for resale purposes, of:

"(a) Solid or pneumatic rubber tires and pneumatic rubber tubes;

• • • • •  
• • • • •

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\* This Code may be found in Codes of Fair Competition, Vol. IX, pp. 519, 524.

*Defendant's Exhibit D—Marsh*

“(c) Tire or battery parts and accessories;

• • • • •  
• • • • •

“(e) The servicing of products of the Trade.”

• • • • •  
• • • • •

“Section 4. The term ‘service’ or ‘servicing’ as used herein shall include, in addition to the direct servicing or repairing of products of the Trade, the rendering of any service to a customer as part of a transaction of sale or offer of sale of any product of the Trade to such customer, and the rebuilding of such products by the members of the Trade.”

This proves conclusively that as early as 1934 the industry recognized retail sales as including all sales “to the ultimate consumer and not for resale purposes.” Obviously, of course, sales to commercial accounts were included within this definition. Moreover, the rebuilding of tires for ultimate consumers was similarly treated as a retail service.

II.

The OPA Price Schedules for the Tire Industry Consistently  
Recognized All Sales for Use, Including Sales to  
Commercial Accounts, as Retail Sales.

The OPA price schedules were also prepared with the advice and assistance of members of the industry, and hence provide valid evidence of what the industry recognized as retail sales.

Price Schedule No. 63, relating to ~~Retail~~ Retail Prices for New Rubber Tires and Tubes, issued by the Office of Price Ad-

*Defendant's Exhibit D—Marsh*

ministration on December 30, 1941, provided in part as follows (7 Fed. Reg. 35, 36):

“When used in this Schedule, the term . . . ‘Sale at Retail’ means any sale to a purchaser for use by such purchaser and not for resale.”

This definition, or one similar to it, was continued throughout the history of OPA. Thus Revised Maximum Price Regulation 528, issued in 1945, the last Regulation containing a definition of retail sales for the tire industry, provided (10 Fed. Reg. 2726):

“ ‘Retail Sale’ means sale to a buyer for his own use and not for resale.”

Similarly, OPA price regulations for wholesale sales recognized that in the tire industry all sales for use are treated as retail sales. Thus Maximum Price Regulation No. 143, relating to Wholesale Prices for New Rubber Tires and Tubes, issued by the Office of Price Administration on May 14, 1942, provided (7 Fed. Reg. 3664, 3666):

“ ‘Sale at wholesale’ means any sale, other than a sale to a vehicle manufacturer for original equipment of such vehicle, except a sale at retail.

“ ‘Sale at retail’ means any sale to a purchaser for use by such purchaser and not for resale.”

Again, a similar definition was continued throughout the history of OPA (see 10 Fed. Reg. 10203, containing the last regulation relating to wholesale prices promulgated in full text).

(We believe that this is the best possible proof that the industry has consistently recognized retail sales as including all sales for use and not for resale. Sales to commercial accounts of course come within this definition.)



*Defendant's Exhibit D—Marsh*

III.

The Accounting Records Kept by Independent Tire Dealers in the Regular Course of Business Demonstrate That They Have Consistently Recognized Sales to Commercial Accounts as Retail Sales.

In obtaining information on this score it has, of course, been necessary to use a sampling procedure. The Association could not seek information from each of its approximately 2500 members. Nor could it use its Board of Directors for this purpose, since it has 56 members. Hence we decided to use the Executive Committee, which has 12 members located throughout the United States as follows: Montgomery, Alabama; Phoenix, Arizona; Oakland, California; Atlanta, Georgia; Chicago, Illinois; Worcester, Massachusetts; Henderson, North Carolina; Tulsa, Oklahoma; Portland, Oregon; Ardmore, Pennsylvania; Dallas, Texas; Aberdeen, Washington.

At a meeting of this Committee, held July 19-20, we asked each member to state his accounting practices with regard to classification of sales. Eleven of the members of the Committee reported that their accounting records classify all sales as either retail or wholesale. In the retail category, they include all sales to consumers, whether they be commercial users or individual users. In the wholesale category they include all sales for resale. These 11 members also stated that this practice has been uniformly followed by them for many years past.

The twelfth member stated that his accounting records broke sales down into three categories—retail, commercial, and wholesale. He added, however, that this was merely a matter of convenience to him, and that he had always considered sales to commercial accounts as retail sales, since they are sales to consumers.

*Defendant's Exhibit D—Marsh*

We submit that this makes it clear beyond doubt that the independent tire dealers of the country have at all times recognized sales to commercial accounts as retail sales.

Because of the shortness of time between the July 19-20 meeting and the date of this submission, we have been unable to obtain samples of records from these 12 members verifying the statements made above. If the Administrator desires that we do so, however, we shall be happy to comply. Moreover, if the Administrator should think it necessary to have information from a wider group, we shall be glad to procure it.

Conclusion.

The NRA codes, the OPA price schedules, and the accounting practices of the independent tire dealers, all demonstrate unequivocally that the members of the tire industry have consistently, and long before the passage of the original Fair Labor Standards Act, regarded all sales to users, including sales to commercial accounts, as retail sales. Furthermore, as is well known, every state in the Union which has a retail sales tax applicable to tires applies that tax to sales to commercial accounts as retail sales. (We submit that all of the evidence taken together makes it clear beyond doubt that sales to commercial users are "recognized as retail sales or services in the particular industry," and should be accepted by the Administrator as conclusive.)

NATIONAL ASSOCIATION OF INDEPENDENT TIRE DEALERS, INC.,

By .....

W. W. MARSH,

Executive Secretary.

Dated: July 30, 1954.

*Defendant's Exhibit E—Marsh*

**DEFENDANT'S EXHIBIT E—WINSTON W. MARSH.**

U. S. Department of Labor  
Wage and Hour and Public Contracts Divisions  
Washington 25, D. C.

Office of the  
Administrator

Aug 9 1954

Mr. W. W. Marsh  
Executive Secretary  
National Association of Independent Tire  
Dealers, Inc.  
624 Wyatt Building  
Washington 6, D. C.

Dear Mr. Marsh:

This will acknowledge and thank you for your recent memorandum report on the problem of retail sales recognition in the tire industry.

If upon completion of our analysis additional information or clarification is necessary, we shall take advantage of your offer of further assistance.

Very truly yours,

VERL E. ROBERTS,

VERL E. ROBERTS,

Acting Assistant Administrator.

*Defendant's Exhibit F—Marsh*

**DEFENDANT'S EXHIBIT F—WINSTON W. MARSH.**

Company A  
Year 1953

Middle West  
Medium-size community

	Sales	Cost of Sales	Gross Profit	%
New Pass. Tires				
Retail .....	29,095.84	24,202.43	4,893.41	16.8
Wholesale .....	7,444.95	7,286.42	158.53	2.1
New Truck Tires				
Retail .....	34,034.38	28,075.77	5,958.61	17.5
Wholesale .....	32,930.35	29,867.98	3,062.37	9.3
Used Tires .....	7,672.68	3,470.07	4,202.61	54.8
Mechanical Goods .....	7,907.73	6,837.94	1,069.79	13.5
Misc. Merchandise .....	21,732.11	16,051.46	5,680.65	26.1
Misc. Sales .....	1,187.58	1,013.79	173.79	1.5
Wheel Bal.—Alignment....	5,587.35	504.26	5,083.09	91.
Service .....	5,718.86	.....	5,718.86	100.
Paint .....	13,468.07	9,772.79	3,695.28	27.5
	<hr/>	<hr/>	<hr/>	
		Total .....	39,696.99	
Recapping Sales .....	68,934.89	25,744.02	43,190.87	62.4
	<hr/>	<hr/>		
Recapping Expenses				
Labor .....	.....	12,011.23		
Supplies .....	.....	144.66		
(Est.) Depreciation.....	.....	2,500.00		
Freight .....	.....	2,050.90		
Payroll Taxes .....	.....	166.94		
Repairs .....	.....	2,601.68		
		<hr/>		
		19,475.41		
Other Income				
Volume Bonus .....	.....	.....	3,866.61	
Discount Earned .....	.....	.....	1,694.55	
Adjusted Credit .....	.....	.....	2,505.71	
Junk Misc. ....	.....	.....	601.67	
			<hr/>	
			8,668.54	
			<hr/>	

[894] [Title omitted in printing.]

[895] [Minute entry of argument and submission—October 5, 1963, omitted in printing.]

[896] [File endorsement omitted.]

In the United States Court of Appeals for the Sixth Circuit

Nos. 15188-9

W. WILLARD WIRTZ, SECRETARY, UNITED STATES DEPARTMENT  
OF LABOR, PLAINTIFF-APPELLANT AND CROSS-APPELLEE

v.

STEEPLETON GENERAL TIRE COMPANY, INC. AND A. E. STEEPLE-  
TON, DEFENDANTS-APPELLEES AND CROSS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

*Opinion—Decided April 27, 1964*

Before: WEICK, Chief Judge, KALBFLEISCH and PECK, District  
Judges

WEICK, Chief Judge: The two appeals present questions of coverage and exemption under the Fair Labor Standards Act, as amended. 29 U.S.C. § 201, et seq.

The action in the District Court was to enjoin the defendants from violating the minimum wage, overtime and record keeping provisions of the Act. It was conceded by defendants that they had not complied with the requirements of the Act, but they contended that it did not apply to their employees.

The District Judge heard the evidence and adopted findings of fact and conclusions of law. He held that the defendants' employees were engaged in commerce or in the production of goods for commerce within the meaning of the Act, and were covered by its provisions, but that their business was exempt from the requirements of the Act as a [897] "retail or service establishment" under Sections 13(a)(2) and 13(a)(4) of the

amended Act.<sup>1</sup> He dismissed the complaint. The Secretary of Labor appealed from the dismissal of his complaint. The defendants filed a cross-appeal from that part of the judgment which determined that they were engaged in interstate commerce and were covered by the Act.

[898] Steepleton General Tire Company, Inc., a Tennessee corporation, was engaged in the sale and distribution of tires and tubes in the Memphis, Tennessee area, which included parts of the adjoining states of Arkansas and Mississippi. It was a franchised dealer of The General Tire & Rubber Company, an Ohio corporation manufacturing tires, tubes and other products. Steepleton provided tire recapping and repair service in its place of business in Memphis. Its customers consisted of individuals, who purchased tires for their own personal use, and commercial users including industrial and transportation companies. Commercial accounts comprised over 50% of its business some of which purchased at discounts. Steepleton made sales to federal, state and local governments on competitive bidding. It made delivery of tires out of its inventory to national accounts sold by The General Tire & Rubber Company. In 1960, which was selected by the parties as a typical year, Steepleton's annual sales of tires amounted to about \$903,520 of which \$86,000 was to out of state customers and about \$58,000 to customers for resale. Its salesmen made regular calls upon customers located in parts of Arkansas and Mississippi.

In our opinion, Steepleton was covered by the Act. Its employees handled, transported and worked on tires destined for these customers outside of Tennessee. The employees removed, recapped, repaired and mounted tires for use on vehicles

<sup>1</sup> Section 13(a) of the Amended Act exempts from the minimum wage and overtime requirements of the Act: "(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. \* \* \* A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or \* \* \* (4) any employee employed by an establishment which qualifies as an exempt establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells. \* \* \*

which operated in interstate commerce. Steepleton maintained accounting records with respect to its out of state sales. This was sufficient under the law to impose coverage. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564; *West Kentucky Coal Co. v. Walling*, 153 F. 2d 582 (CA 6).

There is left for our consideration only the question whether Steepleton was exempted from the requirements of the Act as a "retail or service establishment" under Section 13(a)(2) and 13(a)(4) of the amended Act.

It was the contention of Steepleton that the tire industry recognized only two classifications of sales. The sales to dealers who purchased for resale were claimed to be classified in the tire industry as wholesale. All other sales to ultimate consumers or users were recognized as retail irrespective of price, quantity, discounts, or commercial or industrial character. The Secretary, on the other hand, contended that the sales to commercial or industrial users were classified in the industry as wholesale sales. These included (1) sales and services to "fleet" accounts (customers operating five or more trucks or autos for business purposes at discount prices), (2) sales to national accounts and (3) sales made in competitive bidding to federal, state or local governments.

The Act, as originally passed in 1938, provided an exemption in Section 13(a) for "(2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1060, 1067, 29 U.S.C. § 213(a)(2).

The 1938 Act was construed by the Supreme Court to reach "employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." *Roland Electrical Co. v. Walling*, 326 U.S. 657, 666. In order to be considered "retail sales," the sales or services had to be to an ultimate consumer for his personal use. No sales or services for business uses or purposes were considered retail. *Roland Electrical Co. v. Walling*, supra; *West Kentucky Coal Co. v. Walling*, supra. Under the 1938 Act, Steepleton's commercial sales would be considered as wholesale.

But Congress amended the Act in 1949. Footnote 1 herein sets forth the 1949 Amendment. The Conference Report was clear that "any sale or service, regardless of the type of customer, will have to be treated by the Admin- [899] istrator and the courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service." 95 Cong. Rec. 14,932, 2 U.S. Code, Congressional Service 2241, 2264 (1949). See also 95 Cong. Rec. 11,003-11,004. The Supreme Court, in *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290 construed the amended Act. Mr. Justice Harlan, who wrote the unanimous opinion of the Court, reviewed the legislative history of the 1949 amendment. He stated that it was the purpose of the amendment to reject the so-called "business use" test which had been adopted by the Administrator and approved by the Court in *Roland* "and to substitute a more flexible test, under which selling transactions would qualify as retail, if they (1) did not involve 'resale,' and (2) were recognized in the particular industry as retail." *Id.* p. 294.

The only question in this case, therefore, is whether the sale of tires to commercial users were recognized in the tire industry as retail. Most of the evidence offered in the District Court related to this issue.

A. E. Steepleton, president of the defendant company, had been in the tire business since 1938. He testified that sales for resale were recognized in the industry as wholesale whereas sales to the ultimate consumer were retail. Mr. Steepleton was corroborated by testimony of representatives of the four largest rubber companies in Akron—Goodyear, Firestone, Goodrich and General. These representatives of the "Big Four" related the customary practices and habits in the tire industry as far back as 1934 and they all agreed that the two part classification of tire sales in the industry was traditional. Where the sale was made to an ultimate consumer it was regarded as retail whether made to an individual for his personal use, to a business, industrial firm, trucking or bus company and irrespective of quantity, price or discounts.

Steepleton was further corroborated by the testimony of Winston W. Marsh, Executive Secretary and General Manager of National Tire Dealers and Retreaders Association which had a membership of 3200 tire dealers and Reuben E. Hedlund, Executive Secretary of the Chicago Tire Dealers Association



and editor and publisher of "This Week in Tires," a trade media.

Dr. Warren W. Leigh, who was Dean of the College of Business Administration of the University of Akron and Professor in business administration, testified as to his [900] familiarity with the sales practices in the tire industry. He confirmed the recognition in the tire industry of primarily "two classes—the wholesale which are sales for resale and consumer sales which they call retail."

The Secretary relied on the testimony of two college professors, one from Vanderbilt University and the other from University of Tennessee, and on classifications contained in Government publications such as the Standard Industrial Classification Manual and the Bureau of Census. Dr. Robert C. Brooks, Assistant Professor of Business Administration at Vanderbilt defined retail and wholesale sales as follows:

"In the retail and wholesale trades, which are of course a very large part of the field of marketing, the term 'retail' is applied to those transactions where the motive of the purchaser in buying is his own personal enjoyment or satisfaction.

"The term 'wholesale' includes all those transactions where the motive of the purchaser is to use the product in the conduct of his business for profit making purposes, or, if it is a non profit institution, he intends to use it for the furthering of the aims of his institution."

Dr. John R. Moore, who was professor of economics at the University of Tennessee defined retail sales "as sales to the ultimate consumer, not sales to anyone who might use the product. By ultimate consumer we generally mean the final business consumer—the person who uses the product for his own personal enjoyment. In connection with the sales—say, a sale to one who will incorporate that product in their own service, we don't regard those as retail sales.

"On the other hand, a wholesale sale would include certainly sales for resale, but would also include sales to industrial distributors, to—I should say, to consumers or professional users of the product."

These definitions, he testified, were in accord with the Standards Industrial Classification Manual definition of retailing and wholesaling and other authorities in the field of economics and marketing.

Although the definitions and classifications testified to by Doctors Brooks and Moore may have value theoretically [901] and academically and have been adopted in some industries, they do not conform to the practices as recognized in the tire industry. Doctors Brooks and Moore cited no authority from anyone connected with the tire industry in support of their definitions or classifications.

The Secretary also called as witnesses some commercial customers of Steepleton who regarded their purchasers of tires at discounts as wholesale purchases.

The Wage-Hour Administrator adopted an Interpretive Bulletin in 1959 which undertook to implement the exemption provisions under Section 13 of the amended Act as applied to the tire industry. The Bulletin classified as wholesale, sales for resale, sales made pursuant to a formal invitation to bid, sales to national accounts and sales at discounts to customers operating five or more motor vehicles.

This Bulletin did not have the force and effect of a regulation and was not controlling upon the court. While not binding on the courts, such bulletins "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134 at 140. See also *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 580 fn. 17.

Before the Bulletin was adopted and in an effort to assist the Wage-Hour Administrator in the formation of proper classifications of sales in the tire industry, the attorneys for the four major tire companies submitted to him a joint memorandum signed by them outlining the customs and practices and the two fold recognition of sales in the industry for more than 20 years. The attorneys conferred with representatives of the Administrator in Washington. Mr. Marsh also appeared before the Administrator and presented, orally and by written memoranda, the views of the National Tire Dealers and Retreaders Association with respect to the practices in the tire industry. These efforts turned out to be fruitless. Mr. Walter E. de Bruin, an attorney for Goodyear and Mr. Marsh both

testified that the Interpretive Bulletin adopted by the Ad-[902] ministrator did not conform to the recognition in the tire industry as to what constituted retail and wholesale sales, but merely continued the classifications adopted by the Administrator under the original Act prior to its amendment.

It is clear to us that commercial sales including "fleet sales," and sales to governmental agencies made on invitations to bid were all regarded in the tire industry as retail sales.

With respect to sales to national accounts, they were made by the tire manufacturer and not the dealer. The manufacturer fixed the price, billed the customer, and made the collections. The dealer did not even know the price for which the tires were sold to the national account. The dealer's sole function was to make delivery out of his inventory of the tires sold by the manufacturer to the national account, which inventory was later replenished by the manufacturer who paid the dealer a commission for his service based on the dealer's cost. Book-keeping entries of charges and credits did not change the true nature of the transaction in which the dealer acted merely as delivery agent for the manufacturer.

The District Court ruled that the Interpretive Bulletin adopted by the Administrator did not conform to the customary habits and practices recognized in the tire industry. In our opinion, this was the only conclusion the court could properly reach from the overwhelming evidence in this case. These habits and practices in the tire industry were not of recent origin nor were they adopted to avoid the provisions of the Act, but were traditional and existed for many years before the amendment was enacted.

Irrespective of whether or not the Interpretive Bulletin was valid, the burden of proof still remained on Steepleton to prove that it came within the requirements of the exemption provisions of the Act. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388. The District Court followed the rule in *Arnold*.

We think the burden was met. It was for the District Court to determine from all the evidence whether Steepleton was a retail and service establishment and exempt from the requirements of the Act by reason of Sections 13(a)(2) and (4). The District Judge made the factual determinations. Upon review of the record as a whole we are not convinced that the District Judge made any mistake [903] in his findings of fact. In our judgment, they were not clearly erroneous. *United States v.*

*U.S. Gypsum Co.*, 333 U.S. 364, rehearing denied, 333 U.S. 869.  
His conclusions of law were correct.

The judgment in each case is affirmed.

[904] In the United States Court of Appeals for the Sixth  
Circuit

No. 15188

*Judgment—April 27, 1964*

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

(S) PAUL C. WEICK,  
Chief Judge.

[905] In the United States Court of Appeals for the Sixth  
Circuit

No. 15189

*Judgment—April 27, 1964*

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

(S) PAUL C. WEICK,  
Chief Judge.

[906] [Petition for rehearing covering 19 pages filed May 22, 1964, omitted from this print. It was denied, and nothing more by order. August 3, 1964.]

[924] In the United States Court of Appeals for the Sixth Circuit

15188-15189

*Order on Rehearing—Entered July 28, 1964*

A petition has been filed by W. Willard Wirtz, Secretary of Labor, United States Department of Labor, for a rehearing before the Court en banc of these cases which previously have been decided by a panel of three Judges.

Upon consideration it is ordered that the application for rehearing before the Court en banc be denied and that the petition to rehear be disposed of by the panel of the Court which heard the case on appeal.

(S) PAUL C. WEICK,  
Chief Judge.

[925] In the United States Court of Appeals for the Sixth Circuit

15188-15189

*Order Denying Rehearing—August 3, 1964*

This cause came on to be heard on the petition for rehearing, and on consideration thereof, the Court finds that said petition is not well taken and the same is hereby overruled.

(S) PAUL C. WEICK,  
Chief Judge.

[926] [Clerk's certificate to foregoing transcript omitted in printing.]

[927] Supreme Court of the United States

No. —, October Term, 1964

[Title omitted]

*Order Extending Time To File Petition for Writ of Certiorari—  
November 2, 1964*

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including December 1, 1964.

Potter Stewart,  
POTTER STEWART,  
*Associate Justice of the Supreme Court  
of the United States.*

Dated this 2d day of November, 1964.

[928] Supreme Court of the United States  
No. —, October Term, 1964

[Title omitted]

*Order Extending Time to File Petition for Writ of Certiorari—  
November 30, 1964*

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including December 11, 1964.

Potter Stewart,  
POTTER STEWART,  
*Associate Justice of the Supreme  
Court of the United States.*

Dated this 30th day of November, 1964.

[929]

Supreme Court of the United States

No. 755, October Term, 1964

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

STEEPLETON GENERAL TIRE COMPANY, INC., ET AL.

*Order Allowing Certiorari—Filed March 1, 1965*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.